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Supreme Court, U.S.
FILED
MAY 27
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL J. HALLIWELL,
Appellant,

v.

MARCH FONG EU, SECRETARY OF STATE
OF THE STATE OF CALIFORNIA,
Appellee,

and

THE SENATE AND ASSEMBLY
OF THE STATE OF CALIFORNIA,
Appellee-Intervenors

On Jurisdictional Transfer from the
Ninth Circuit Court of Appeals
Under 28 U.S.C. § 1631

APPENDIX B TO JURISDICTIONAL STATEMENT

Pursuant to Rule 15.1 j(iv) and (v)

In Propria Persona

Michael J. Halliwell
2930 Colorado Avenue, #D-18
Santa Monica, California 90404
(213) 829-2821

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FROM THE TRANSFER OF JURISDICTION
OVER HIS AUGUST 31, 1985 PETITION
FOR A WRIT OF MANDAMUS
TO THE UNITED STATES SUPREME COURT
BY THE ORDER OF FEBRUARY 26, 1987

FILED BY MAIL ON MARCH 27, 1987
WITH NINTH CIRCUIT COURT OF APPEALS

PROOF OF SERVICE BY MAIL

I, Betty Halliwell, am a citizen of the United States and am self employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My home address is that of 2930 Colorado Ave. #D-18, Santa Monica, California.

On March 27, 1987 I served the attached notice of appeal from the order of February 26, 1987 via first-class mail with postage fully prepaid at Santa Monica, California on the attorneys of record for Defendants March Fong Eu, Secretary of State of California; Chief Justice Rose E. Bird; intervenors, Assembly and Senate of California; and the members of the three-judge panel and Clerk of the District Court and the Clerk of the Ninth Circuit Court of Appeals:

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United States Court of Appeals
P.O. Box 547
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Sacramento, CA 95814

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Chief Judge, Eastern Dist. Calif.
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The Hon. Raul A. Ramirez
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Executed this 27th day of March, 1987 at Santa Monica, California.

I declare under penalty of perjury, pursuant to California law, that the above is true and correct.

_____

Betty Halliwell, Ph.D.
(Signature)

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FOREWORD

Plaintiff hereby notifies the other parties in Halliwell v. Eu and the Ninth Circuit panel and the Eastern District of California Federal District Court panel involved in this case that he will appeal the purported transfer of jurisdiction over his August 31, 1985 petition for mandamus to the United States Supreme Court by the order of February 26, 1987. This notice is typed to conform to the margin requirements of Supreme Court Rule 33 so that it may be included in Plaintiff's jurisdictional statement, as required by Supreme Court Rule 15.

The obscurity of the orders which purport to transfer jurisdiction over Plaintiff's appeal to the Supreme Court is a device whereby those anxious to avoid scrutiny of the procedural misconduct in this case hope to proceed directly to the trial court's substantive rulings without

first allowing Plaintiff any opportunity to gain enforcement of his procedural rights and thereby develop a minimally - adequate factual record on which to base an appeal on the merits. But Federal Rule of Appellate Procedure 21(b) flatly precludes any such effort to "get around" procedural issues and proceed directly to the underlying merits on the basis of a deliberately misleading record compiled by a district court which has engaged in a systematic obstruction of justice from the inception of the case.

Federal Rule of Appellate Procedure 21(b) requires that a mandamus petition take precedence over any ordinary appeal, so Plaintiff's August 31, 1985 appeal dealt only with the issue of mandamus. Plaintiff's notice of appeal for mandamus listed eight specific forms of procedural relief necessary to the compilation of a factual and legal record on which a sub-

stantive appeal could then be based.

Since only procedural issues are relevant until there has been a ruling on Plaintiff's right to the issuance of a writ of mandamus, the "statement of the case" in Part I infra provides only a procedural history of the case. The first half of the statement of the case traces proceedings from the outset, noting the grievances set forth in Plaintiff's opening complaint (in Section A), Judge Karlton's sua sponte dismissals of most of these claims (in Section B), Plaintiff's unsuccessful efforts to secure prompt adjudication (in Section C), and the eventual disposition of Plaintiff's claims (in Section D).

The second half of Part I traces the courses of mandamus proceedings in this case, starting with the procedural relief sought by Plaintiff (in Section E), going on to the Assembly's dismissal motion (in

Section F), and concluding with the rulings on the Assembly's motion (in Section G).

Part II discusses the tactics that are being used to sabotage Plaintiff's right to appeal and the massive procedural misconduct in the case which these tactics seek to cover up. Section A is divided into five subsections which explain in chronological order specific procedural devices used in this coverup. A.1. deals with the tactics used by the District Court to avoid adjudicating the controversy over Senate district misnumbering so that the Democratic Party could circumvent the 1982 reapportionment referenda and illegally perpetuate their control of the Legislature for the rest of the decade.

The next three subsections deal with efforts by Plaintiff to develop a case record appropriate for appeal on the merits and the parallel efforts of Defendants and the Court to prevent such a record

from being compiled. Subsection A.2. discusses the process by which Plaintiff compiled the index of the case record and filed it in spite of the District Court's sua sponte termination of proceedings as this process was nearing completion. Subsection A.3. describes Plaintiff's efforts to combat the sua sponte termination of District Court proceedings by compiling a case appendix and excerpts from the case record so that any reviewing court could determine the nature of the factual and legal disputes in the case in spite of the lack of District Court opinions dealing with them. Subsection A.4. concerns the response to Plaintiff's efforts to expedite consideration of his appeal from the sua sponte termination of proceedings by the District Court; in this subsection Plaintiff shows how the Assembly's motion to dismiss his appeal and the Ninth Circuit's efforts to transfer jurisdiction to

the Supreme Court were attempts to use Supreme Court rules to preclude Plaintiff from adequately presenting his side of the case. Subsection A.5. presents Plaintiff's argument that after five years of combatting one obstructionist tactic after another he should not be required to simply respond to further tactics of this sort; Plaintiff contends that an investigation to examine the documentation of his claims regarding these obstructions of justice is the only way that such tactics can be terminated and the case set on a proper course toward adjudication on the merits.

Section B of Part II outlines the specific steps which should be taken once the ongoing obstruction of justice (which is still continuing) has been brought to a halt. First, Defendants should be required to respond to Plaintiff's procedural grievances set forth in his August 31, 1985 petition for mandamus. Then the

Ninth Circuit should be required to either grant or deny each of the specific forms of procedural relief requested in Plaintiff's petition for mandamus. Only after Plaintiff has secured enforcement of his procedural rights is a notice of appeal regarding the substantive disposition of his claims appropriate, and not until then should any determination be made regarding the jurisdictional pathway that such an appeal should follow.

I. STATEMENT OF THE CASE

A. Plaintiff's Cause of Action

Halliwell v. Eu (Civ.S. 82-147-LKK) is a redistricting action filed in the Eastern District of California Federal District Court challenging the constitutionality of California's Congressional, Senate, Assembly, and Board of Equalization districts. Plaintiff's February 19, 1982 opening complaint alleged that the contested districts were mandated by the California Supreme Court in violation of the Due Process Clause of the Fourteenth Amendment, that the court-ordered districts violated Article XXI of the California Constitution, that the abrogation of referendum stay provisions violated the Guaranty of a Republican form of government in Article IV § 4 of the U.S. Constitution, and that the districts manifest partisan, ethnic and geographic discrimination in violation of the Equal Protection

Clause of the Fourteenth Amendment.

B. Judge Karlton's Order of July 1, 1982

Plaintiff's case was assigned to the Honorable Lawrence K. Karlton. The California State Assembly and Senate intervened on May 3, 1982 and presented dismissal motions which were argued on June 11, 1982. Judge Karlton's July 1, 1982 ruling on intervenors' dismissal motions held: "The motions to dismiss the complaint for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction are denied." (4 Record 57.) However, Judge Karlton's order of July 1 declares:

> "As I shall explain, these motions do not fatally pierce the Plaintiff's lawsuit. They are, however, a useful tool with which to hack away the necrotic claims and attached allegations, arguments, innuendo, and creative legal theories which form the bulk of this massive, sprawling complaint. In this manner I hope to reveal whether there is any living tissue consisting of cognizable

constitutional claims buried within this great flaccid carcass." (4 Record 42-43.)

The order also notes:

"As I have indicated, Mr. Halliwell makes a number of claims and advances a plethora of legal theories that relate marginally or not at all to any legally cognizable injury that he has suffered. In order to chart a course through the rhetorical morass created by the Plaintiff, I shall attempt to fix my compass on the specific legal harms that Mr. Halliwell claims to have suffered. As I shall demonstrate, this approach inevitably eliminates the great majority of the Plaintiff's claims and theories." (4 Record 44-45.)

The order of July 1 concludes,

"Accordingly, the Plaintiff is directed to file with the Court and serve on all defendants within thirty (30) days of the effective date of this order, a new complaint. That pleading shall be denominated 'Second Amended Complaint,' and shall set forth a short and plain statement of those claims which are cognizable in this court -- i.e., the claims based on the alleged violation of the Plaintiff's voting rights protected by the 'one person, one vote' guarantees of the United States Constitution. The new complaint shall also contain a concise statement of the relief which the Plaintiff seeks; the details of Plaintiff's proposals should not be included. Finally, the Plaintiff is

> directed not to assert any claims that have been discussed in this order and dismissed without leave to amend.
>
> "Upon filing and service of the Plaintiff's Second Amended Complaint, the Court shall request that the Chief Judge of this Circuit convene a three-judge court pursuant to the procedure set out in 28 U.S.C. § 2284 (b)." (4 Record 57-58.)

C. Plaintiff's Unsuccessful Efforts to Secure Adjudication of His Claims Prior to the November 2, 1982 General Election

On July 12, 1982 Plaintiff filed an amended complaint (4 Record 65-76) in conformity with the restrictions imposed by Judge Karlton and a motion (4 Record 77-93) for reconsideration by the three-judge panel of Judge Karlton's sua sponte dismissals without leave to amend. Plaintiff's efforts to determine from Judge Karlton's lawclerk whether Judge Karlton's dismissals without leave to amend were final dispositions led to a permanent ban on any communication between Plaintiff and

Judge Karlton's staff. When the three-judge panel had not been convened by the last day before what appeared to be the appeal deadline from the order of July 1, 1982, Plaintiff appealed the exclusion of most of his claims to the Ninth Circuit.

Operating without any guidance from the Court, Plaintiff tried to pursue the claims ruled cognizable by Judge Karlton while awaiting a ruling on his excluded claims from the Ninth Circuit. Foremost among the claims allowed by Judge Karlton was Plaintiff's challenge to the cancellation of Senate elections in some districts and the election of extra senators from other districts by means of odd-even number switches (Senate district misnumbering.) A hearing on Senate district misnumbering was scheduled for September 7, 1982, but this was vacated on August 31, 1982 because "Plaintiff's [appeal] may have divested this court of jurisdiction

over the instant case during the pendency of that appeal." (5 Record 111.) However, the order of August 31 promised: "Upon disposition of the appeal, this court will schedule an expedited status conference to determine the most expeditious manner in which to proceed with this litigation." (5 Record 111.)

On September 28, 1982 Circuit Judges Wright and Hug rejected Plaintiff's appeal, ruling:

> "This appeal is dismissed for lack of jurisdiction. An order dismissing a complaint, or part of a complaint, with leave to amend is not a final appealable order. See Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982)." (5 Record 114.)

After waiting a week for the promised expedited status conference to be scheduled, Plaintiff sought reconsideration of the dismissal of his appeal. Plaintiff's motion for reconsideratin noted that Judge Karlton's dismissals were without leave to

amend and that Scanlon supra held:

> "Ordinarily, an order granting a motion to dismiss under rule 12(b)(6), F.R.Civ.P., carried with it the right to amend under rule 15(a), and is not an appealable final judgment. Here, however, the ruling was on a ground not curable by amendment . . . ." Id. at 1272.

In fact, Scanlon squarely states: "The order is appealable." Id. (Emphasis added.)

On October 11, 1982 Plaintiff sought an immediate hearing on his proposal to enjoin the election of extra senators from districts already represented by senators with two years remaining in their terms of office. Plaintiff argued (at 5 Record 133):

> "Because time is a crucial element in an elections case, matters clearly within the mandate of the three-judge panel should not be held hostage to force Plaintiff to relinquish his right to appeal the conduct of a single judge."

On October 19, 1982 the District Court ruled:

> "[I]t appears that as a result of the Plaintiff's [motion for reconsideration] this court remains divested of jurisdiction until the Ninth Circuit has finally disposed of the appeal. See, In re Thorp, 655 F.2d 997, 998 (9th Cir. 1981). While this court is prepared to act promptly and expeditiously when it has regained jurisdiction over the lawsuit, it is not willing to act at all when, by all appearances, it lacks jurisdiction. The Plaintiff's request for an immediate hearing is therefore denied." (5 Record 186-187.)

The Ninth Circuit denied reconsideration of its dismissal of Plaintiff's appeal and also denied a subsequent petition to expedite action by the District Court. As a result the District Court was allowed to delay action on Plaintiff's case until the Legislature elected from the contested districts re-enacted these districts with an illegal urgency clause barring any referendum challenge to them.

D. Disposition of Plaintiff's Claims by the Three-Judge District Court

Plaintiff was finally able to secure a hearing on his Senate district misnumbering grievance on February 16, 1983. This hearing was originally slated to consider Plaintiff's Assembly claim also, but this aspect of the case was postponed because the Assembly failed to respond as required by the Court's briefing schedule. See 7 Record 384-385. Consideration of Plaintiff's Congressional claim also was postponed, because Judge Karlton suggested that Plaintiff must first serve papers on each of California's 45 incumbent congressmen. See 8 Record 125-126. Action of Plaintiff's Board of Equalization claim could not be secured either, because the claims was supported by the Secretary of State (see 1 Reccrd 221, 4 Record 245) and no other defendant was willing to defend against it. (A Board of Equalization defense by anyone but the California Supreme Court would have been difficult, since the

Court action giving rise to this claim was a per curium order without any explanation of the Court's reasoning.)

On April 19, 1983 the Court deferred a ruling on Senate district misnumbering because of

> "problems that appear to implicate fundamental constitutional doctrines and that also appear never to have been presented squarely to another federal court. These problems are sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the Court." (8 Record 118.)

On March 27, 1984 the District Court denied Plaintiff's motion for special elections to remedy Senate district misnumbering

> "because even if he were to amend his complaint to allege a cognizable claim, or convince us of the correctness of his vote acceleration and deferral theory, the Court would in the exercise of its equitable power deny him the relief he seeks. New, statewide elections would simply be too drastic a remedy for the hypothetical problem which time alone will very shortly resolve." (12 Record 245.)

the order of March 27 also notes,

> "In holding that we would not, in any event, grant the relief requested in this case we do not pass upon the question of when, if ever, vote acceleration and deferral can rise to the level of constitutional infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us." (12 Record 244.)

Although the Assembly was urged by the Court to file its summary judgment motion so that it could be heard at the February 16, 1983 hearing (see 16 Record 192) and warned by the Court that no other motions would be considered while those argued on February 16 were still pending (see 14 Record 442), the Assembly delayed its motion and then filed it out of season. The Court subsequently granted the Assembly's motion (without a hearing) because Plaintiff adhered to the Court's restrictions and thus did not file a rule 56(f) Fed.R.Civ.Proc. countermotion. According to the order of March 27, 1984:

> "The Plaintiff vigorously disputes the figures proffered by the Assembly, but not in any legally cognizable way. The United States Court of Appeals for the Ninth Circuit has repeatedly held that a party opposing another's motion for summary judgment must counter the moving party's affidavits or declarations with affidavits or declarations of his own, and failure to do so will result in the granting of the motion. [Citations.]" (12 Record 248.)

The order of March 27 blocked any action on Plaintiff's Board of Equalization claim by eliminating the California Supreme Court as a defendant (on account of technical defects in Plaintiff's May 17, 1982 joinder). See 12 Record 252. The order likewise justified its adverse ruling on Plaintiff's Senate claim by declaring Plaintiff's supplemental pleading challenging the 1984 districts invalid. See 12 Record 244, 255. Plaintiff therefore moved to rejoin the California Supreme Court and for leave to amend his complaint. Plaintiff also moved for reconsideration of the order itself.

The order of March 27 finally required someone to defend against Plaintiff's Congressional claim (see 12 Record 253) and invited Plaintiff to submit additional documentation of this claim (see 12 Record 255). However, the Secretary of State short-circuited consideration of this claim by simply refusing to file her opposition to Plaintiff's Congressional motion. See 13 Record 446-447.

Plaintiff sought to rectify evidentiary defects criticized by the order of March 27 by compelling discovery from defendants who had refused to voluntarily supply essential data on the contested districts. Plaintiff's discovery motions were referred by the Court to a magistrate who, after twice postponing a hearing, was slated to hear Plaintiff's motions on July 25, 1985. Plaintiff filed (15 Record 83-164) a "Case History and Current Status as of June 29, 1985" (which documented the

delaying tactics used to thwart adjudication) in support of his motions, but before the scheduled hearing could take place the District Court issued a sua sponte ruling on July 9, 1985 dismissing the action in its entirety. See 15 Record 198.

This sua sponte termination of the action took place without any ruling on Plaintiff's motion for reconsideration of the order of March 27. It also was done before Plaintiff could refer to the full court preliminary rulings by Judge Karlton on joinder of the California Supreme Court and leave to amend Plaintiff's complaint. Judge Karlton had simply signed the following order (14 Record 3) submitted by Defendant:

> "Good cause appearing therefor, the Court denies the motion to join the Supreme Court. No claim is or can be stated against the Supreme Court with respect to the issues in this case."

Judge Karlton's ruling on leave to amend

was a footnote added to the above order:

> "To the degree the Plaintiff seeks to amend or supplement his complaint, the motion is also DENIED, as the amendments or supplementations add nothing to the claims already rejected by the Court in previous motions."

Plaintiff sought reconsideration of the order of July 9, 1985 (see 15 Record 228-270). This motion was rejected by the Court without response by Defendants, rebuttal by Plaintiff or any hearing. As a result Plaintiff was never allowed any discovery, there was no adjudication at all of Plaintiff's Board of Equalization claim, and his Congressional and Assembly claims were dismissed without any hearing ever having been held on them. The order of August 5, 1985 justified all of this as follows:

> "Plaintiff has filed a motion for reconsideration of the Court's order of July 9, 1985, which dismissed this action. The Court has determined that it may dispose of this motion without the benefit of oral argument. Accordingly, the motion is hereby submitted on the record and papers

currently before the Court. See Local Rule 230(h), E.D.Cal. (1984).

"Plaintiff's basis for seeking reconsideration is a disagreement with the Court's reasoning in disposing of this case. This is insufficient. See Local Rule 230(k). The appropriate method for challenging this court's reasoning is an appeal to an appropriate tribunal.

"Accordingly, Plaintiff's motion is DENIED without leave to renew it.

"IT IS SO ORDERED." (15 Record 353-354.)

E. Plaintiff's August 31, 1985 Petition for Mandamus

The District Court's handling of the case did not produce the barest semblance of a foundation for an adjudication on the merits by the United States Supreme Court. Defendants had been allowed by the trial court to avoid supplying any information on their redistricting plans, and the Court had simply ignored nearly all of Plaintiff's legal arguments. Facing a case record in much better condition in Fusari v. Steinberg 419 U.S. 379 (1975), the

Supreme Court said, "We are unable meaningfully to assess the issues in this appeal on the present record." Id. at 387. The Fusari court therefore concluded, "The judgment of the District Court is vacated, and the case remanded for reconsideration . . . ." Id. at 390.

Plaintiff tried to avoid the delay that such a remand would cause by seeking a writ of mandamus to clarify the case record. Since Federal Rule of Appellate Procedure 21(b) gives such a request precedence over ordinary appeals, Plaintiff's notice of appeal sought eight specific forms of procedural relief and Plaintiff deferred any substantive appeal until the Court of Appeals ruled on this petition for mandamus.

Plaintiff's petition for mandamus (16 Record 1-15) sought to require the three-judge panel considering the case to: (1) reconsider its dismissal (without

completion of briefing or any hearing) of Plaintiff's Congressional claim and apply governing precedents to this claim;

(2) rule on his motion for a declaratory judgment on Senate district misnumbering;

(3) rule on his motion for reconsideration of the dismissal with prejudice of his Senate claim;

(4) rule on his motion for reconsideration of the summary judgment granted without a hearing to the Assembly;

(5) apply governing precedents regarding jurisdictionally substantial claims and rule on his motion for leave to amend his complaint;

(6) explain how the authority which mandated the contested districts is not a proper defendant in ruling on his motion to rejoin the California Supreme Court:

(7) rule on pending motions to compel

discovery which were aborted by its sua sponte termination of the action; and

(8) restore normal communications between Plaintiff and the staff of the judge conducting proceedings, thus placing Plaintiff on the same basis as the other parties.

F. Assembly's Motion to Dismiss Plaintiff's Mandamus Appeal

Plaintiff accompanied his September 20, 1985 Docketing Statement (16 Record 16-58) filed pursuant to Ninth Circuit rules with a motion seeking a prebriefing conference at the earliest convenience of the other parties. See 16 Record 21. Plaintiff argued:

> "The U.S. Supreme Court notes in Roche v. Evaporated Milk Assn. (1943) 319 U.S. 21, 26 that the issuance of a writ of mandamus to an inferior court is appropriate 'to compel it to exercise its authority when it is its duty to do so.' The District Court's flouting of the expedited consideration requirement of 28 U.S.C.

> § 2284 has been so egregious that the 1982 and 1984 legislative elections both were conducted without any adjudication of Plaintiff's challenge to the constitutionality of the districts used in them, and unless the District Court is compelled to discharge its duty to adjudicate, the same fate appears likely to befall the 1986 elections. In Hall v. West, District Judge (1964) 335 F.2d 481 mandamus was applied to overcome similar delaying tactics by the District Court.
>
> "The Supreme Court ruled in Will v. United States (1967) 389 U.S. 90, 100: 'The legal proposition that mandamus will lie in appropriate cases to correct willful disobedience to the rules laid down by this court is not controverted.' Plaintiff does not seek to control the District Court's decision on the merits of any of his claims but simply to require that the Court follow the Federal Rules of Civil Procedure and thereby allow compilation of at least a minimally adequate factual record." (16 Record 35-36.)

The Ninth Circuit ignored Plaintiff's plea for expedited action and the precedence given mandamus appeals under Federal Rule of Appellate Procedure 21(b) until March 20, 1986, when Plaintiff filed a protest of the Court's inaction. See 16 Record 94-96. Finally, on April 15, 1986,

the Ninth Circuit set in motion procedures for scheduling of a prebriefing conference. See 16 Record 104.

Plaintiff did not seek issuance of any writ in his motion for expedited consideration, only that the Court promptly initiate procedures necessary to explore the procedural issues in dispute. Plaintiff's March 20, 1986 renewal of his September 20, 1985 motion for promptly holding a pre-briefing conference argued:

> "In his Docketic Statement Plaintiff has explained why it is important that such a conference be held:
>
> > 'It is important that oral argument be held regarding the appropriateness of mandamus because questioning by the Appellate Court is the only way to cut through the deliberate evasiveness that has been employed in copious amounts by Defendants and the District Court to obscure the fundamental issues in this case.' Id. at 35.
>
> Furthermore, it would be unfair to proceed to this briefing stage of this appeal until Plaintiff has had an opportunity at a prebriefing conference to determine the opposition's positions on vital matters relating to this appeal on which they have

been and continue to be so evasive." (16 Record 94-95.)

Even though the conference requested by Plaintiff posed no threat to any legitimate interest of the Assembly, the Assembly objected to the holding of a prebriefing conference. See 16 Record 108-110. Thus the Assembly continued to pursue its long-standing policy of minimizing scrutiny of the underlying issues. See 4 Record 305-310, 7 Record 271-274, 8 Record 172-177, 11 Record 534-539, 12 Record 112-120, 13 Record 156-160, 13 Record 592-598, 14 Record 150-158, 14 Record 439-450 and 15 Record 12-17.

On May 8, 1986 the Ninth Circuit ruled: "Pursuant to the 'Objection of the Assembly of the State of California to Prebriefing Conference,' filed April 25, 1986, the scheduling of a prebriefing conference shall be stayed." (16 Record 114.)

In its subsequent motion (16 Record

122-142) seeking the dismissal of Plaintiff's appeal the Assembly totally ignored the specific procedural issues in Plaintiff's petition for mandamus and gave not the slightest indication of a challenge to the Ninth Circuit's jurisdiction to issue such a writ. The only challenge to Plaintiff's right to the procedural relief he sought was the bare statement: "This is not a case in which mandamus should be granted." (16 Record 137.)

In his response to the Assembly Plaintiff notes that the Assembly quoted the following passage from MTM, Inc. v. Baxley, 420 U.S. 799 (1975):

> "[A] direct appeal will lie to this court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." Id. at 804.

Plaintiff notes supra that the Assembly did not quote the portion of MTM v. Baxley

which sets out language in § 1253 that limits direct appeal to orders promulgated after notice and hearing:

> "[A]ny party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Id. (Emphasis added.)

Plaintiff's response demonstrated that the absence of a hearing on the Assembly's summary judgment motion was intimately bound up with "the merits of the constitutional claim presented below." Plaintiff observed (at 16 Record 191-193):

> "Counsel for the Assembly clearly realized that the Assembly's motion for summary judgment should be filed so that the three-judge panel could hold one hearing on all aspects of the case, for at the December 6, 1982 status conference the following colloquy occured:
>
> 'MS BRENNER [Assembly counsel]: With respect to the Assembly's motion to dismiss, we have indicated our intention to file a motion for summary judgment, which is essentially a failure to state a claim. Would the

> Court have any objection to combining that with the motion to dismiss?
>
> 'THE COURT: I would be thrilled. If we could get all the motions together, so we could gather them up, take a day on the three judges' calendar, have them all heard, then hopefully we could dispose of them and find out whether we have a live lawsuit. And if we do, get it on the calendar and get it moving; and if we don't so be it.' Hearing Transcript at 27-28.

"See Exhibit 1 (15 Record 12-17) and Exhibit 2 (14 Record 441-451) for summaries of tactics used by the Assembly to prevent Plaintiff from responding effectively to its summary judgment motion. Because the Assembly willfully filed its summary judgment motion in violation of the calendar established by the Court, the motion was not properly noticed; and Plaintiff, who observed the Court's restrictions, was maneuvered out of any opportunity to file a Rule 56f counter-motion (based on the obstruction of his ability to prepare affidavits required by the Court by the Assembly's refusal to divulge the necessary population data).

"Yet Plaintiff's failure to provide appropriate affidavits was the pivotal factor which the District Court used to justify granting the Assembly's summary judgment motion. Had a hearing been held on the Assembly's summary judgment motion, as would have been the case had it been filed according to the established

> calendar, Plaintiff could have raised the issue of the withheld population data during oral argument. The hearing requirement of § 1253 presumably exists to preclude direct appeals to the Supreme Court which are based on just such a flawed record as was thus created here."

Plaintiff's opposition to the Assembly's dismissal motion complained (at 16 Record 198-199) of the Assembly's long-established policy of deliberate concealment of the essential facts of the case:

> "All of Plaintiff's charges relating to the tactics used by the Assembly to obscure the true facts in this case have been repeated and documented several times in previous filings. However, the only response that the Assembly has ever made to these charges is noted at 30 of Plaintiff's Docketing Statement: 'Mr. Halliwell's continued attacks on counsel, like his previous attacks on this court, are false. They do not deserve any further response.' 13 Record 341. The Assembly's efforts to conceal the true characteristics of their districts and to terminate these proceedings without ever responding to Plaintiff's charges regarding the tactics used to accomplish this concealment resemble the behavior of a child caught raiding the cookie jar who gives reason after reason why he shouldn't have to take his hands from behind his back and show them. Yet

> Plaintiff has been allowed absolutely no discovery of any sort.
>
> "In these circumstances the District Court's abrupt sua sponte termination of these proceedings, whether intended to preclude the magistrate's ruling on Plaintiff's pending discovery motions or not, certainly cannot be used to justify the panel's continued refusal to rule on Plaintiff's right to discovery."

Plaintiff summarized his opposition to the Assembly's dismissal motion by arguing (at 16 Record 219-220):

> "The Assembly concluded its objection to a prebriefing conference by requesting 'that Plaintiff's appeal be dismissed on the Court's own motion or in the alternative that the appellees be provided an opportunity to file a motion to dismiss the appeal prior to any prebriefing conference being considered or set.' [16 Record 110.] But the Assembly's challenge to the Ninth Circuit's jurisdiction which it presents in the brief filed pursuant to granting of the above request provides absolutely no reason why this court lacks jurisdiction to provide any of the eight types of relief requested in Plaintiff's notice of appeal.
>
> "Instead the Assembly erects a straw man by suggesting that Plaintiff is actually seeking a ruling on the merits in asking the Court of Appeals to evaluate the appropriateness of the District Court's handling of the case. Of course Plaintiff

seeks an eventual reversal of the District Court's adverse decisions on those of his claims which have been denied for alleged lack of constitutional merit, but he has requested no such relief from this court. The appropriate time for determining the pathway for an appeal on the merits comes after essential briefing and rulings on pending motions in the District Court, and completion of this process is the objective of this petition for mandamus. Plaintiff does not even request that any writ of mandamus issue at this stage -- only that the issues of due process involved in this request be properly explored through discussion and briefing.

"The Assembly requests (1) that no prebriefing conference be held and (2) that this court dismiss this appeal on its own motion without briefing on the specific procedural issues in dispute. But the Assembly attempts to justify these requests with only flat assertions and invocation of the very rulings to which Plaintiff objects on Due Process grounds. It avoids addressing the procedural issues involved in Plaintiff's requests of this court because to do so would focus attention on gross misconduct which the Assembly fervently hopes will pass unnoticed.

"Plaintiff has been quite explicit in his Docketing Statement regarding the wide scope and politically sensitive nature of the official misconduct alleged; yet without having offered any substantive defense in this case, the Assembly asks this court to refuse to even hold a

> prebriefing conference. The Assembly never admits even implicitly that politically explosive charges are the essence of this case; yet the Assembly asks this court to immediately terminate these proceedings in the Ninth Circuit Court of Appeals. In effect the Assembly is asking this court to join in the prolonged attempt to cover up the official misconduct which still continues to allow California's legislative elections to be conducted in unconstitutional districts.
>
> "The fact that the official misconduct complained of by Plaintiff is never referred to in the Assembly's latest memorandum is itself an example of the prolonged attempt at coverup alleged by Plaintiff. The Assembly's attempt to further postpone judicial intervention and avoid a substantive defense of its own actions by obtaining a denial of any conference, briefing or hearing of Plaintiff's request for mandamus should be rejected."

The Assembly's rebuttal in support of its dismissal motion avoids all mention of the procedural issues which are the focus of Plaintiff's petition for mandamus. The Assembly does not even address Plaintiff's complaints regarding the Assembly's continuing tactics of obfuscation and concealment. See 16 Record 234-236. Instead the

Assembly quotes several of Plaintiff's statements out of context to try to convey the impression that Plaintiff's appeal seeks review of "the substance of his claims on the merits." See 16 Record 499-502. The Assembly's continued evasiveness thus further supports Plaintiff's charge that it is attempting to perpetrate a coverup of the basic facts and real issues in this case.

G. Disposition of Plaintiff's Mandamus Appeal by the Ninth Circuit

The Ninth Circuit waited two-and-a-half critically important months (while the 1986 elections process went forward) before ruling on the Assembly's dismissal motion. When the Court did rule, its superficial order avoided all mention of any aspect of the case. On August 19, 1986 Circuit Judges Tang, Brunetti, and Kozinsky ruled:

> "The Supreme Court has exclusive jurisdiction over this appeal. 28 U.S.C. § 1253, MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Fusari v. Steinberg, 419 U.S. 379 (1975). Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States. 28 U.S.C. § 1631." (16 Record 239.)

When a litigant seeks to invoke the jurisdiction of the U.S. Supreme Court, the Court's Rule 15 requires that he set forth the nature of the proceeding below (with specific reference to the judgment or decree sought to be reviewed) and the questions presented by the appeal (expressed in the terms and circumstances of the case). Without this sort of information any appellee would find it very difficult to argue effectively that the High Court's jurisdiction had been improperly invoked. As Justice Brandeis notes for the Court in Virginian Railway Co. v. United States (1926) 272 U.S. 658, 675,

> "The failure to accompany the decree by an opinion may thus deprive

> litigants of the means of exercising a sound judgment on the propriety of an appeal; and the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case and will ordinarily be subjected to much unnecessary labor."

The problems of a pro se litigant seeking to knowledgably exercise his right of appeal from the Ninth Circuit's jurisdictional determination are further compounded by the fact that since 28 U.S.C. § 1631 was enacted in 1982 it has never been used to transfer an appeal to the U.S. Supreme Court. Surely a court addressing an issue of first impression is obliged to provide much more than the perfunctory treatment provided by the order of August 19, 1986.

Plaintiff promptly sought reconsideration of the order of August 19, pointing out how 28 U.S.C. § 1253, MTM v. Baxley, supra and Fusari v. Steinberg supra both supported Ninth Circuit jurisdiction over

any appeal on the merits and that there was no question of the Ninth Circuit's jurisdiction to grant the procedural relief which was all that was sought by Plaintiff's actual appeal. See 16 Record 240-258. Judges Tang, Brunetti and Kozinski waited until all of the time before the 1986 General Election had expired (Plaintiff's appeal was filed 14 months before this election) and then issued the following order on November 5, 1986: "Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied." (16 Record 259.)

Faced with what must be one of the most perfunctory purported invocations of the jurisdiction of the Supreme Court in the history of American jurisprudence, Plaintiff protested in his motion for clarification of the order of November 5, 1986:

> "Since the Ninth Circuit has supervisory responsibility over the District Court which Plaintiff alleges has engaged in a politically motivated systematic obstruction of justice, it simply must enforce those impartial rules which are designed to preserve the integrity of the judicial process. The difference between a judicial system premised on the rule of law and one in which those in authority are above the law is clearly noted in Yick Wo v. Hopkins (1886) 118 U.S. 356, a landmark case famous for its defense of the political franchise as the 'fundamental political right, because preservative of all rights.' Id. at 370. In Yick Wo the Court notes that unbridled discretion 'hardly falls within the domain of law' because it has 'no rules by which its impartial execution can be secured or partiality and oppression prevented.' Id. at 372-373. Emphasis in original. In the circumstances of this case, for any judge to simply wash his hands of responsibility and refuse to explain why is grossly incompatible with that judge's oath of office." (16 Record 271.)

Plaintiff's motion for clarification cites a crucial issue raised in briefing prior to the order of August 19, 1986 which must be addressed in a proper disposition of Plaintiff's appeal by any circuit court cognizant of its responsibility to preserve

the integrity of its own judicial process:

> "THIS APPEAL SEEKS RELIEF FROM THE COURT'S REFUSAL TO EVEN DISCUSS SUPREME COURT DECISIONS WHICH CONTRADICT THE COURT'S REASONING AND THE COURT'S EXCLUSION FROM THE RECORD OF FACTS WHICH ARE NECESSARY TO DETERMINE THE CONSTITUTIONALITY OF THE CONTESTED DISTRICTS. Facts and procedures are necessary components, 'part and parcel,' of substantive determinations, and to allow a lower court to tailor these to exclude from their own and higher courts' consideration everything which does not support the rulings of that lower court makes meaningful appellate review impossible." (16 Record 216.)

Plaintiff's motion for clarification also makes the point that even if the District Court were deemed to have faithfully applied the law as it existed when it made its rulings, Plaintiff was still entitled to an order vacating the judgment below to bring it into conformity with a subsequent Supreme Court decision. Thus Plaintiff argued:

> "The dismissal with prejudice of Plaintiff's Senate claim by the order of March 27, 1984 (at 5-6) is justified by the District Court because

> 'Plaintiff's allegation that the apportionment plan discriminates against Republicans avails him nothing. There is no authority for the proposition that a reapportionment plan that discriminates on the basis of political party offends the Equal Protection Clause. . . . The Supreme Court has invalidated only those apportionment plans which neutralize or exclude racial or ethnic minority groups. . . . Thus the Plaintiff's complaint that the challenged plan disadvantages Republicans does not state a claim upon which relief can be granted.'
>
> "As Plaintiff notes (at 19) in his Docketing Statement, this finding that partisan gerrymandering is a grievance unworthy of adjudication is appealable to the circuit courts; see Simkins v. Gressette (1980) 631 F.2d 287. Moreover, the Ninth Circuit has a clear duty to vacate this dismissal in lgiht of Davis v. Bandemer (1986) 106 S.Ct. 2797, 2807, where the Supreme Court determined that 'the political gerrymandering claim in this case is justiciable,' and the Court notes, 'As Gaffney [412 U.S. at 751-752] demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability.' It. at 2806." (16 Record 268.)

On February 26, 1987 Judges Tang, Brunetti and Kozinski issued a response to Plaintiff's motion for clarification which

apparently disputed Plaintiff's interpretation of Heckler v. Edwards (1983) 465 U. S. 870, 885 (at 16 Record 251-254) in his motion for reconsideration of the order of August 19, 1986. There Plaintiff argued that Heckler's ruling, "If a party does not contest the holding [which is the statutory basis for direct review] and seeks review only of another portion of the court's judgment, the party should file a notice of appeal to the appropriate court of appeals," was based on logic which applied equally well to 28 U.S.C. § 1252 and 28 U.S.C. § 1253. However, their order of February 26 gives no supporting precedent and no explanation of its own reasoning which led it to reject Plaintiff's interpretation of Heckler supra. The Court simply said,

> "Appellant's motion for clarification of our prior orders in this case is denied, as is his request for a stay of the transfer of his appeal

to the Supreme Court. Appellant fails to comprehend that the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 depends not on the nature of the issues he may seek to raise, but on the nature of the order entered by the district court. We will not entertain any further requests for reconsideration, clarification, or the like.

"Appellant, we note, has also sought an en banc hearing [seeking to force the panel to rule on his motion for clarification], expressly disavowing any desire for a rehearing en banc. His request is factually impossible and is denied on that ground.

"The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further submissions from Appellant will be received in this case. The Clerk shall return to Appellant any proffered filings."

II. ISSUES TO BE RAISED ON APPEAL

A. Systematic Obstruction of Justice

1. Warning to the Court Regarding its Apparent Breach of the Good Behavior Requirement of Article III § 1

On January 15, 1984, nearly a year had passed since the February 16, 1983 hearing, and the Court's contemplation of "problems [which] are sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the Court" (see 8 Record 118) threatened to interfere with Plaintiff's right to timely relief affecting the 1984 elections. Since the Court's delaying tactics had already allowed the 1982 elections to be conducted without any adjudication of Plaintiff's challenge to the constitutionality of the districts used therein, Plaintiff made the following plea:

> "PLAINTIFF URGENTLY REQUESTS THAT A STATUS CONFERENCE BE HELD AT THE EARLIEST POSSIBLE DATE TO EXPEDITE

PROCEEDINGS IN THE CASE. TIME IS RUNNING OUT FOR PROVIDING EFFECTIVE RELIEF AFFECTING THE 1984 ELECTIONS." (11 Record 593. Emphasis in original.)

Plaintiff argued in support of expedited consideration:

"The basic issue in this long struggle over redistricting in California is summarized by the Los Angeles Times of January 11, 1984 at Part I, page 10:

'For all the cheeriness of the day, Democrats are never far from reaching a critical mass over reapportionment. Deukmejian is pushing to get a public vote on a plan to redraw legislative district lines in a fashion more favorable to the GOP. It would be the third consecutive election challenge to haunt Democrats.

'"He's tinkering with a time bomb. There is nothing that can undo all the good will he has generated like reapportionment,' said Assemblyman Gray David (D-Los Angeles). Put another way by Sen. Garamendi (D-Walnut Grove): "If he pushes reapportionment, it's all-out warfare."'

"So far in this all-out war the Democratic Party, with the support of its top officials in executive, legislative and judicial granches of California's state government, has abrogated (1) the initiative of Article II § 8, (2) the referendum

> of Article II §§ 9 and 10, (3) the anti-gerrymandering protections of Article XXI, (4) the requirement of Article IV § 6 that 'Each senatorial district shall choose one senator,' (5) the provision of Article I § 3 that 'The people have the right to instruct their representatives', (6) the provision of Article II § 1 that 'All political power is inherent in the people . . . they have the right to alter or reform it when the public good may require' and impaired numerous other provisions of the California Constitution. In these circumstances the Guaranty Clause of Article IV § 4 of the United States Constitution is clearly applicable." (11 Record 594-595.)

Plaintiff had previously documented the wholesale abrogation of the enumerated portions of the California Constitution in Volume 9 of the Case Record and the pervasive defects of the districts themselves in 8 Record 314-543 and Volume 10 of the Case Record. The tactics used to thwart state and federal constitutional protection for political rights were summarized in 1 Record 29-275 and 11 Record 1-349.

Plaintiff's motion of January 15, 1984 concluded:

> "In spite of determined efforts by the victims of this wholesale abrogation of the rule of law to secure protection for their rights in federal court, not a single aspect of any of these federal lawsuits has been adjudicated. This total paralysis of the federal judiciary in California on this crucial and sensitive issue of California government resembles a situation which recently came to light in Chicago. The Los Angeles Times of December 15, 1983 at Part I page 6 notes,
>
> > '"The judiciary and the legal community were just too closely knit to develop witnesses," said a Justice Department lawyer involved in the Greylord investigation.'
>
> "In view of the serious harm to Claifornia's institutions of representative democracy and to the reputation of the federal judiciary resulting from the total failure of adjudication in this and related cases, the time clearly has come for the members of this court to take prompt and effective action to uphold and defend the United States Constitution as interpreted by the U.S. Supreme Court. . . ." (11 Record 595.)

After the Court had flouted the expedited consideration requirement of 28 U.S. C. § 2284 for nearly two years Plaintiff felt obliged to summarize the state of the law regarding the good behavior requirement

for federal judges:

> "While the Constitution permits the removal of any civil officer, including judges, by impeachment for having committed 'a high crime or misdemeanor,' the Constitution also contains a provision that federal judges 'shall hold their offices during good behavior,' Art. III § 1. 'Good behavior' means more than simply refraining from the commission of crimes, and impeachment is not required to remove a federal judge from office.
>
> "This was made clear in a recent case involving Circuit Judge Otto Kerner, in United States v. Isaacs (1974) 493 F.2d 1124. In Isaacs the court's opinion notes:
>
> > 'The provision of Art. III § 1, that federal judges "shall hold their Offices during good Behavior," which had a recognized common law meaning and which was accompanied at common law by a procedure for its effectuation, serves as a limitation on the tenure of federal judges. R. Berger, Impeachment: The Constitutional Problems at 125-128. No clause in the Constitution is without meaning. Marbury v. Madison, 1 Cranch [5 U.S.] 137, 174 and Holmes v. Jennison 14 Pet. [39 U.S.] 540, 571.' Id. at 1142.
> >
> > 'The members of the [First] Congress who must have been acutely aware of the provisions of the Constitution and the debate which preceded their adoption construed the Constitu-

> tion to permit the removal of a judge without impeachment.' Id.

As the Isaacs opinion notes:

> 'The fact that after Marbury v. Madison, 1 Cranch [5 U.S.] 137, the judges gave up and never sued to retain their offices proves nothing. The interesting fact is that this early Congress acted as it did.
>
> 'Turning the pages of history, the Supreme Court said in an 1882 decision, United States v. Lee, 106 U.S. 196, 220, that:
>
> > "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
> >
> > "It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."' Id. at 1142-1143." (11 Record 350-351.)

After outlining the sweeping scope of judicial abrogation of the rule of law by state and federal judges in California, Plaintiff's January 15, 1984 memorandum continues:

"No conceivable definition of 'good behavior' can emcompass collusion in a massive coverup of judicial misconduct, whether the participation is active or simply dereliction of duty; and it makes no difference whether a judge is motivated by sympathy with the purposes of a conspiracy to abrogate political rights or simply by judicial in-group solidarity. It is simply not permissible to wish the good behavior requirement contained in Art. III § 1 out of existence, pretending that the proper standard for judicial conduct is abstention from commission of high crimes and misdemeanors which would require impeachment. [Continued in footnote: Moreover, impeachment would be inappropriate in this case because any impeachment resolution directed against federal judges who have participated in the coverup of the flagrant abrogation of federally protected voting rights by the California Supreme Court in Assembly v. Deukmejian and subsequent litigation would have to be considered by a House of Representatives which includes six California congressmen who owe their seats to blatantly gerrymandered districts imposed by Assembly v. Deukmejian.] The good behavior requirement stands apart; and as noted in Marbury v. Madison, supra, every phrase of the Constitution is significant.

> 'In expounding the Constitution of the United States, every word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly

> added. The many discussions which have taken place upon the construction of the Constitution, have proven the correctness of this proposition and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.' Holmes v. Jennison (1840) 39 U.S. 540, 570-571." (11 Record 354-355.)

On February 6, 1984, nearly a year after the motions under consideration by the Court had been argued on February 16, 1983, the District Court denied Plaintiff's motion of January 15, 1984, explaining:

> "Plaintiff has requested an immediate status conference in order to 'expedite proceedings in the case.'
>
> "The undersigned judges currently have under advisement defendant in intervention SENATE OF THE STATE OF CALIFORNIA's motion to dismiss Plaintiff's claims relating to the reapportionment of that body, and Plaintiff's motion for a preliminary injunction seeking to unseat three state senators, and hold special elections. In light of these pending motions, it would be ill-advised to hold a status conference at this time. Plaintiff, in his motion, and the accompanying 'Supplemental Memorandum on the Refu-

> sal of the Ninth Circuit to Adjudicate Federal Challenges to the Redistricting Plans Adopted in Assembly v. Deujmejian,' does not seek to explain why a status conference at this time would serve a useful purpose.
>
> "Plaintiff's motion requesting an immediate status conference is therefore DENIED.
>
> "IT IS SO ORDERED." (12 Record 46-47.)

The Court thus continued a delay in adjudication of Senate district misnumbering which by then had lasted for nearly two years.

When the case was less than a month old Plaintiff had alerted the Court to the political motivation behind cancelling elections in some districts and instead electing a second senator from other districts which averaged 8% more Democratic in party registration:

> "One such motive is to unseat an opposition party incumbent in the district with an expiring term by leaving him nowhere to run. The seat where the election has been postponed will be much easier to capture when a non-incumbent election occurs in the following election.
>
> "Another motivation is to get

> extra mileage out of one's own party stronghold in the carryover district. One or two extra seats gained this way may become the margin for controlling the Senate. This may be vital if the new Legislature is again charged with the task of reapportionment." (1 Record 167.)

The Court

(1) refused to take action on any of Plaintiff's claims before the June 1982 primary election because, according to the order of May 4, 1982 (at 3 Record 43): "It now appears that the Plaintiff may still obtain a legally efficacious remedy should he prevail on the merits of this action after this court disposes of the motions brought on pursuant to this order";

(2) vacated a September 7, 1982 hearing on Senate district misnumbering because, according to the order of August 31, 1982 (at 5 Record 111) Plaintiff's appeal from Judge Karlton's sua sponte dismissal of other claims "may have divested this court of jurisdiction over the instant case dur-

ing the pendency of that appeal";

(3) rejected Plaintiff's October 14, 1982 request for an immediate hearing on Senate district misnubering because according to the order of October 19, 1982 (at 5 Record 186-187)

> "It appears that as a result of Plaintiff's activities[1], this court remains divested of jurisdiction until the Ninth Circuit has finally disposed of the appeal. See, In re Thorp, 655 F.2d 997, 998 (9th Cir. 1981).[2] While this court is prepared to act promptly and expeditiously when it has regained jurisdiction over the lawsuit, it is not willing to act at all when, by all appearances, it lacks jurisdiction";

(4) denied Plaintiff's motion for time shortening (6 Record 52-56) when the lame-

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[1] After Plaintiff's interlocutory appeal was dismissed the Court failed to honor the promise made by the order of August 31 supra that "Upon disposition of the appeal, this court will schedule an expedited status conference to determine the most expeditious manner in which to proceed with this litigation," so Plaintiff sought reconsideration of the dismissal of his appeal.

[2] As Plaintiff demonstrates at 5 Record 189-196, In re Thorp supra and its supporting authorities affirm that jurisdiction is transferred during an interlocutory appeal only "with respect to any matters involved in the appeal."

duck Governor called an illegal special session on redistricting and Plaintiff (at 6 Record 60) sought a ruling on the legality of premature Senate elections in 6 SD, 12 SD and 32 SD before these senators could help adopt an illegal urgency clause to block any referendum challenge to a re-enactment of the districts rejected in the June 1982 referenda, because according to an order (at 7 Record 524-526) promulgated on December 17, 1982 but not filed until February 8, 1983, "Nowhere in his moving papers does Plaintiff establish that irreparable injury will occur if his application for a preliminary injunction is not heard before the day set for the hearing of all other pending motions, February 16, 1983"; and

(5) ruled on April 19, 1983 (at 8 Record 118) that it should postpone deciding the Senate district misnumbering issue on account of "problems [which] are sufficiently

novel, subtle, and grave as to demand the most careful and thorough consideration by the Court."

All these actions by the Court gave Plaintiff cause for concern that the Court might delay ruling on Senate district misnumbering until it was too late even to implement Plaintiff's December 6, 1983 revised proposal for interim special elections with the run-off to be held simultaneously with the June 1984 Primary Election. This concern had become alarm by March 13, 1984, when Plaintiff renewed his December 6 motion:

> "When this court failed to act on Plaintiff's term-shortening motion in time to hold special elections coterminous with the November 8, 1983 city general elections Plaintiff complained on December 6, 1983:
>
> > 'Since November 8, 1983 has passed into history it is impossible to hold interim special elections on that date as proposed in Plaintiff's motion of January 6, 1983. However, it is possible to salvage some vestige of constitutional government

> by holding special elections for the remainder of the terms of the congressmen and state legislators elected in 1982 . . . . If turnout in the runoff election is to be maximized a special election should be called no later than March 19, 1984. . . .' 10 Record 15, 28. Emphasis in original.
>
> "On January 15, 1984 Plaintiff protested (at 11 Record 305-307) this court's continuing failure to act on his term-shortening motion. Action on this motion is now a matter of utmost urgency." (12 Record 153-154.)

The Court responded to this plea by waiting until March 19, 1984 was well past and then ruling (on March 27, 1984):

> "Although Plaintiff requests the Court to order a new election, the Court is of the opinion that such a remedy is too drastic considering the present posture of the litigation. Assuming, arguendo, a constitutional violation, any scheme devised by this court to remedy the problem of voting acceleration and deferral would almost immediately be superceded by California's new 1984 apportionment plan. Even if the Court were to order a special election, by the time a new electoral scheme could be designed and ordered, and new elections held, the 1984 elections would be all but underway. The 1984 apportionment plan is not before us and we must presume it to be constitutional. In these circumstances, the ordering of

> a new election as requested by the Plaintiff would not be an appropriate exercise of the Court's equitable powers. [Citations.] The Court, therefore, will grant the Senate's motion to dismiss the Plaintiff's complaint insofar as it challenges the numbering of the senatorial districts. In holding that we would not, in any event, grant the relief requested in this case we do not pass upon the question of when, if ever, vote acceleration and deferral can rise to the level of constitutional infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us." (12 Record 243-244.)

The order of March 27 goes on to state:

> "The Court has already determined that the Plaintiff has no chance of success on the merits, because even if he were to amend his complaint to allege a cognizable claim, or convince us of the correctness of his vote acceleration and deferral theory, the Court would in the exercise of its equitable power deny him the relief he seeks. New, state-wide elections would simply be too drastic a remedy for the hypothetical problem which time alone will very shortly resolve." (12 Record 245.)

Because of the reasons just stated, the order of March 27 proclaims: "Since the Court is not prepared to grant the Plaintiff any relief, it would be a futile act

to allow Plaintiff leave to amend his complaint." (12 Record 241.)

Because of the sequence of events noted above, Plaintiff became convinced that the District Court was not motivated by any sincere belief regarding what the law required but was trying to sabotage the process of adjudication by stalling until it was impossible for Plaintiff to gain any relief, whether or not his claims were meritorious. Therefore Plaintiff (in his memorandum in opposition to the order of March 27, 1984) urged the Court to cease and desist from what Plaintiff felt was a deliberate attempt to "render nugatory through the interposition of subterfuges" (Justice Clark, concurring in Baker v. Carr at 369 U.S. 186, 262) political rights whose constitutional protection was affirmed in the most unequivocal fashion in Wesberry v. Sanders (1964) 376 U.S. 1, 17:

"No right is more precious in a free

country than that of having a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Plaintiff argued (at 12 Record 381-382):

"The order of March 27, 1984 concludes (at 11) its analysis of Plaintiff's challenge to the numbering of Senate districts:

> 'The Court, therefore will grant the Senate's motion to dismiss the Plaintiff's complaint insofar as it challenges the numbering of senatorial districts. In holding that we would not, in any event, grant the relief requested in this case we do not pass upon the question of when, if ever, vote acceleration and deferral can rise to the level of constitutional infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us.'

"The Court gives no indication that it is at all embarrassed by the fact that the 'circumstances before us' have arisen entirely from the Court's own indefensible delay in handing down its decision. In seeking to excuse its delay in deciding the constitutional issues presented by the misnumbering of Senate districts the panel had noted in its order of April 19, 1983:

> '[We face] problems that appear to implicate fundamental constitutional doctrines and that

> also appear never to have been presented squarely to another federal court. These problems are sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the Court.' 8 Record 118.

"But however one tries to excuse the delay itself, the failure of this court to use the thirteen-and-a-half months it spent pondering the misnumbering issue to decide the constitutionality of this practice is an egregious breach of faith. For if the Court had found the numbering of the contested districts to be constitutional and had been sustained in this finding by the U.S. Supreme Court the feeling of millions that the 1982 elections were stolen and that a fraudulently elected Legislature had then perpetuated itself in office for the remainder of the decade would be overcome to a substantial degree. On the other hand, if the misnumbering of Senate districts were found to be unconstitutional the knowledge that this outrage could not be repeated would be of some solace. The Court's refusal to rule on this question is similar to a surgeon's allowing a patient to slowly bleed to death while the surgeon ponders at great length objections of the validity of the patient's consent forms when those objections have been lodged by those who stood to benefit greatly from the patient's death.

"Therefore if this court is indeed resolute in its determination not to pass upon the question of when, if ever, vote acceleration and defer-

> ral can rise to the level of constitutional infirmity, it will leave the U.S. Supreme Court no choice but to decide when, if ever, obstruction of justice in the conduct of a case rises to the level of a breach of the good behavior requirement which limits the tenure of federal judges under Article III § 1 of the United States Constitution." (12 Record 380-382.)

2. Compilation of the Index to the Case Record

On June 25, 1984 the District Court ordered briefing on Plaintiff's motion for reconsideration of the order of March 27, 1984, and this briefing was completed on August 6, 1984 (see 13 Record 282-284). When no ruling on reconsideration had been handed down seven-and-a-half months after briefing had been completed it was obvious that the Court was again resorting to deliberate delaying tactics. It also seemed likely that any ruling by the Court would be another unpublished order that avoided or systematically misrepresented the fundamental factual and legal issues.

Foreseeing that an index of proceedings to facilitate appellate review would be essential if the Court failed in its obligation to set forth the facts and contentions of the parties in an opinion justifying its disposition of the case, Plaintiff on March 21, 1985 initiated a process which would produce such an index. Plaintiff's first step in this process was to summarize Defendants' filings and solicit contributions by them regarding modification of the summaries and the categories used to classify them. (See 15 Record 384-388.) On May 9, 1985 Plaintiff continued the index compilation process by providing Defendants with summaries of all points set forth in rulings by the Court. (Plaintiff's letters to Defendants pointed out, "Supreme Court Rule 30.2 notes, 'The parties are encouraged to agree to the contents of the joint appendix.'")

Plaintiff also wrote,

> "Moreover, Supreme Court Rule 30.7 permits 'a case to be heard on . . . the appendix used in the court below, if it conforms to the requirements of this Rule.' (It is for this reason that side margins of the individual entries have been set to facilitate production of a final version which will conform to the High Court's specifications.)" (See 15 Record 389-394.)

The District Court's sua sponte termination of the action on July 9, 1985 came before Plaintiff had had an opportunity to solicit input from Defendants regarding summaries of his own filings. However, after Plaintiff sought reconsideration of the order of July 9 and the Court peremptorily cut short briefing and denied reconsiderationon August 5, 1985 Plaintiff was able to complete the index and file it before the appeal deadline. (See 15 Record 395-396.) Plaintiff provided the District Court and the other parties with a chronological index of his summaries of key points in prior proceedings on August 23, 1985, and the same

summaries indexed by topic on August 31, 1986. Plaintiff subsequently employed this index to facilitate consideration of his Board of Equalization claim, which was still before the District Court, and in support of his petition for mandamus to clarify the case record regarding his Congressional, State Senate and State Assembly claims. (See 16 Record 68, 102.)

3. Case Appendix and Excerpts from the Case Record

On March 20, 1986 the District Court continued to refuse to provide any explanation of its flat refusal to take cognizance of Plaintiff's Board of Equalization claim, and the Court of Appeals had taken no action on Plaintiff's petition for mandamus regarding his other claims. Plaintiff sought to expedite action by both courts by filing a case appendix which provided verbatim texts of all the points summarized in the case index. Since

the case appendix was arranged by topic, it allowed any court to compare the actual statements of all participants regarding any of the legal or factual disputes in the case. (See 16 Record 59.)

Since the Court of Appeals had taken no action on Plaintiff's petition for mandamus (in spite of its precedence over ordinary appeals mandated by Fed.RuleApp. Proc. 21(b) and Plaintiff's six-month-old motion for expedited consideration (16 Record 20-22)), Plaintiff made one more effort to get the three-judge panel to rule on his motion for leave to amend his complaint. (The full court had explicitly affirmed that Plaintiff was entitled to such a ruling under 28 U.S.C. § 2284(b)(3), and Plaintiff argued that such an action would be "in aid of the appeal" pending before the Ninth Circuit. (See 16 Record 78.) In support of this effort Plaintiff provided to the Court and the other parties

a 300-page document which brought together excerpts from the case record that dealt with the substantive aspects of his excluded claims and the procedural issues relating to his right to amend his complaint.

4. Reactions to Plaintiff's Submissions to Facilitate Adjudication

Pursuant to Plaintiff's March 20, 1986 renewal of his plea for expedited consideration of his August 31, 1985 petition for mandamus, a Conference Attorney for the Ninth Circuit set in motion arrangements for a prebriefing conference. (See 16 Record 104.) However, the Assembly then moved to block such a conference and to dismiss the appeal. This led to the Ninth Circuit's order of August 19, 1986, which purported to transfer jurisdiction over Plaintiff's petition of mandamus to the U.S. Supreme Court without giving any explanation of why the Court had decided

that "The Supreme Court has exclusive jurisdiction over this appeal." (16 Record 239.)

Plaintiff's motion for reconsideration of the order of August 19 was rebuffed by the even more cryptic order of November 5, 1986, which said only, "Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied." (16 Record 259.)

Given the refusal of the Ninth Circuit to provide even the barest semblance of the information which Supreme Court Rule 15 requires to invoke the jurisdiction of the High Court, Plaintiff was faced with the necessity of using up most of the time before the docketing deadline in the Supreme Court in an effort to research all possible jurisdictional arguments. Plaintiff would then have had to devote most of his jurisdictional state-

ment to complex issues such as the applicability of Heckler v. Edwards (1983) 465 U.S. 870, with little space left for the issues he would raise in an appeal on the merits. Then, under Rule 16.7, Plaintiff would face the possibility of a summary affirmation of the District Court's disposition of the case, and since Supreme Court Rule 15.1(j) requires complete texts of lower court opinions of which review is sought but Rule 15.3 limits appellant to 30 pages, Plaintiff was gravely concerned about the misleading nature of the statements made about the case by the District Court.

Plaintiff therefore filed a motion (16 Record 260-271) in the Ninth Circuit seeking clarification of the order of November 5, 1986, and when seven weeks had passed without a ruling and the docketing deadline loomed ever closer, Plaintiff made application (16 Record 336-343) to

his Circuit Justice for a stay of jurisdictional transfer pursuant to the order of November 5 until that totally obscure order had been clarified.

5. Need for an Investigation of Tactics Used to Sabotage Plaintiff's Right to an Adjudication on the Merits

In the course of trying to avoid the procedural trap into which he was being forced by the order of November 5, 1986, Plaintiff petitioned (16 Record 284-335) the Ninth Circuit en banc seeking an investigation of the continuing obstructionist tactics being employed by judges handling his case and asked for intervention by the Chief Judge of the Ninth Circuit (16 Record 282-283) to ensure that there would be a ruling as promised (16 Record 344) on his motion for clarification of the order of November 5 before his appeal was transferred to the U.S.

Supreme Court. Plaintiff prepared a detailed documentation (16 Record 346-502) of the complained-of obstructionist tactics and submitted this "Memorandum on Status of the Case as of January 22, 1987" to the Chief Judge of the Ninth Circuit in support of his December 1, 1986 request to the Ninth Circuit en banc for an investigation. He also submitted it to the Circuit Justice for the Ninth Circuit in support of his application for a stay of jurisdictional transfer.

Pursuant to a request on behalf of Justice O'Connor, Plaintiff also prepared and submitted in support of his stay application a compilation of "District Court's Orders in the First Five Years of Halliwell v. Eu" and a companion volume, "Contexts and Principal Passages of the Orders of the District Court in Halliwell v. Eu, February 19, 1982 - February 19, 1987."

On February 26, 1987 the Ninth Circuit panel handling Plaintiff's appeal issued the promised ruling on Plaintiff's motion for clarification, but the order of February 26 did nothing to explain the Court's jurisdictional reasoning aside from apparently rejecting Plaintiff's interpretation of Heckler v. Edwards supra. This order held,

> "Appellant's motion for clarification of our prior orders in this case is denied, as is his request for a stay of the transfer of his appeal to the Supreme Court. . . . We will not entertain any further requests for reconsideration, clarification, or the like." Id. at 1.

The panel also purported to "hang up the phone" in behalf of the Ninth Circuit en banc and to "yank the cord out of the wall" in behalf of the Ninth Circuit itself: the order states,

> "Appellant, we note, has also sought an en banc hearing, expressly disavowing any desire for a rehearing en banc. His request is factually impossible and is denied on that ground.

> "The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further submissions from Appellant will be received in this cause. The Clerk shall return to Appellant any proffered filings." Id. at 2.

Whatever might be said regarding the holding of the order of August 19, 1986 that jurisdiction over Plaintiff's appeal properly belonged in the Supreme Court, there is no doubt that a litigant who sought to invoke the Supreme Court's jurisdiction in such a perfunctory manner would find his jurisdictional statement rejected out of hand. The adamant refusal of the orders of November 5, 1986 and February 26, 1987 to supply any explanation of the Court's reasoning clearly interferes with the knowledgable exercise by a pro se litigant of his right to appeal. Therefore Plaintiff is clearly entitled to a delay in jurisdictional transfer until the grounds for such a purported invocation

of Supreme Court jurisdiction have been explained with reasonable clarity.

The orders of November 5, 1986 and February 26, 1987 are demonstrably only the tip of an iceberg which consists of a fierce determination by several judges of the Ninth Circuit to sweep under the carpet what has transpired in five years of Halliwell v. Eu. There certainly ought to be some forum in which Plaintiff's extensive and thoroughly indexed documentation of judicial misconduct described above can be given thoughtful evaluation, and such an evaluation should commence very soon so that informed decisions can be made regarding the proper course of future proceedings in this case in time to prevent a fourth set of elections from getting underway using the contested districts without any adjudication of their constitutionality.

B. Compilation of an Adequate Factual Record on Which to Base an Appeal on the Merits

Only after appropriate briefing, hearings and rulings in the trial court have been secured is it appropriate to determine the proper avenue for an appeal on the merits. But evaluation of the procedural disputes involved in Plaintiff's August 31, 1985 petition for mandamus never progressed even to the point of eliciting a response from Defendants during the one-and-a-half years Plaintiff's petition was under consideration by the Ninth Circuit. In view of the extreme gravity of an alleged obstruction of justice supporting a sustained assault on an entire state's institutions of representative democracy, some response to Plaintiff's charges by Defendants should be required as an essential first step in determining whether Plaintiff is entitled to the eight

specific forms of procedural relief sought in his petition.

Once the mandate of Federal Rule of Appellate Procedure 21(b) has been honored and the trial court has acted on those aspects of the case where "it is its duty to do so" as required by Roche v. Evaporated Milk Assn. (1943) 319 U.S. 21, 26, the next step in the appeal process is a notice of appeal regarding the substantive rulings of the District Court. The question of which substantive dispositions to appeal is a decision an appellant is entitled to defer until he has secured enforcement of his procedural rights.

Respectfully submitted,

MICHAEL J. HALLIWELL
Plaintiff-Appellant in Propria Persona

Dated March 27, 1987

PLAINTIFF-APPELLANT'S NOTICE OF APPEAL

FROM THE NINTH CIRCUIT'S

DENIAL OF JURISDICTION OVER

PLAINTIFF'S AUGUST 31, 1985

PETITION FOR MANDAMUS

FILED BY MAIL ON DECEMBER 1, 1986

WITH NINTH CIRCUIT COURT OF APPEALS

CERTIFICATE OF SERVICE

C.A.# 85-2496

On December 1, 1986 I served the attached notice of appeal from the Ninth Circuit's denial of jurisdiction via first-class mail with postage fully pre-paid at Santa Monica, California on the interested parties in this action listed below:

Chief Justice Rose E. Bird
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Deputy Atty. Gen. Carol Hunter
1515 K Street, Suite 511
Sacramento, CA 95814

The Hon. Lawrence K. Karlton
Chief Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Raul A. Ramirez
District Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Anthony M. Kennedy
Circuit Judge
Ninth Circuit Court of Appeals
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2400 Avenue of the Stars, Fourth Floor
Los Angeles, CA 90067

Executed this 1st day of December, 1986

at Santa Monica, California.

2930 Colorado Ave. #D-18
Santa Monica, CA 90404

MICHAEL J. HALLIWELL
Plaintiff in Propria Persona

FOREWORD

The Ninth Circuit has refused to entertain a petition for mandamus to correct alleged gross procedural violations by one of its own district courts on grounds of an alleged lack of jurisdiction. By taking 14 months to make this decision the Ninth Circuit has denied Plaintiff's petition for mandamus the expedited consideration to which it is entitled under the Federal Rules of Appellate Procedure. When the Court finally did rule, it offered no explanation of its reasoning and made no reference at all to the circumstances in the case which might justify its decision. Then the Court denied reconsideration of its ruling without the barest semblance of a justification.

The notice of appeal appended hereto is directed against this denial of jurisdiction over Plaintiff's petition

for mandamus by the Ninth Circuit. This is a separate matter from the procedural grievances involved in Plaintiff's original petition for a mandamus. Plaintiff seeks only reversal of the Ninth Circuit's jurisdictional ruling; the issuance of any writ of mandamus would be appropriate only after briefing and oral argument on the procedural issues in dispute have taken place.

INTRODUCTION

The first section of this notice of appeal defends the jurisdiction of circuit courts to issue writs of mandamus to their own district courts. This authority is so utterly clearcut that Plaintiff can find no instance where this jurisdiction has even been questioned, much less a case where a court of appeals has refused to entertain a petition for mandamus against a district court on jurisdictional grounds.

The second section points out that a petition for mandamus to clarify the case record obviously must take precedence over any ruling on the merits of the case and goes on to note that even if clarification of the record were deemed inappropriate the Ninth Circuit still would have jurisdiction at this stage of proceedings because there is no aspect of the case the disposition of

which would support a direct appeal to the U.S. Supreme Court.

I. Unambiguous Circuit-court Mandamus Jurisdiction Over Its Own District Courts

As Plaintiff notes (at 21) in his Docketing Statement and (at 31 of) his opposition to the Assembly's challenge to the Ninth Circuit's jurisdiction, in United States v. United States District Court (1948) 334 U.S. 258, 263-264 the U.S. Supreme Court ruled:

> "We put to one side the question whether another appeal in the case would be decided by the Circuit Court of Appeals or by this court, now that there is a quorum of Justices qualified to sit in it. No matter how that question were resolved, it is our opinion that the Circuit Court of Appeals has jurisdiction in this mandamus proceeding.
>
> ". . . It was early recognized that the power to issue a mandamus extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction . . . .
>
> "But the fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate. . . . It is, indeed, a

> high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to . . . a higher court's . . . past exercise of jurisdiction . . . [or] a present or future one."

Moreover, Supreme Court Rule 26 permits a mandamus petition to the High Court only after mandamus relief has been sought from the appropriate circuit court.

Plaintiff notes (at 31) in his "Opposition to the Assembly's May 19, 1986 Motion to Dismiss Appeal":

> "Los Angeles Brush Corp. v. James, District Judge (1927) 272 U. S. 701, 706 holds: 'We believe that supervisory control of the district courts by the courts of appeals is necessary to proper judicial administration in the federal system.'"

Plaintiff protests (at 5) in his "Petition for Reconsideration of the Order of August 19, 1986":

> "The responsibility of each circuit to maintain the integrity of its own judicial process is well established. Plaintiff has extensively documented wholesale flouting of the Federal Rules of Civil

> Procedure and made them the basis for this appeal: Item 1 of Plaintiff's petition for mandamus seeks to require the District Court to address a squarely applicable controlling Supreme Court precedent. Items 2, 3, and 4 seek to require rulings on motions briefed and then ignored by the District Court for 1-2 years in flagrant violation of the expedited hearing requirement of 28 U.S.C. § 2284. Items 5, 6, 7, and 8 seek rulings by the full panel on 'sensitive and politically emotional' issues which they must decide under Swift & Co. v. Wickham (1966) 382 U.S. 111, 119. The fact that Defendants have pointedly refused to discuss these charges makes it all the more essential that the Court address them, yet the order of August 19 does not do so."

II. Avoidance of Pivotal Issues by the Orders of August 19, 1986 and November 5, 1986

Plaintiff argues (at 1) in his August 26, 1986 "Petition for Reconsideration of the Order of August 19, 1986":

> "The order of August 19, 1986 does not address any of the points raised in Plaintiff's August 31, 1985 petition for mandamus. The basic issue which the order avoids is whether a litigant is entitled to secure a minimally adequate record before he is required to go

> directly to the U.S. Supreme Court for a final disposition on the merits. This issue is of overwhelming importance when the litigant has been allowed no discovery and the district court has simply refused to rule on many of his claims and proposed remedies."

At 4-9 of Plaintiff's "Opposition to the Assembly's May 19, 1986 Motion to Dismiss Appeal" Plaintiff (1) quotes provisions of 28 U.S.C. § 1253 limiting its coverage to "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction"; (2) shows that the failure of the court to hold a hearing on the Assembly's summary judgment motion was no mere technicality but part of a well-orchestrated strategy to conceal the constitutionally relevant characteristics of the contested Assembly districts; and (3) notes that the District Court's ruling on the one issue decided after hearing (senate district disenfranchise-

ment and double representation) could not be directly appealed to the U.S. Supreme Court because it failed to satisfy the other requirement of MTM v. Baxley in that it did not "rest upon resolution of the merits of the constitutional claim presented below."

At 4-5 of Plaintiff's "Petition for Reconsideration of the Order of August 19, 1986" he complains:

> "In 28 U.S.C. § 1253 Congress has added an important procedural safeguard where the usual intermediate level of appellate review is to be removed: a direct appeal to the U.S. Supreme Court will be in order only if the granting or denial of injunctive relief takes place after notice and hearing. The order of August 19, 1986 completely ignores Plaintiff's demonstration (at 4-9 of his opposition to the Assembly's motion) that there is no claim in this case which has been disposed of after the hearing required by § 1253 that also satisfies MTM v. Baxley's requirement that the district court's disposition 'rests upon resolution of the merits of the constitutional claim presented below' 420 U.S. at 804. Yet the order cites Baxley in support of an alleged exclusive Supreme Court

jurisdiction over this appeal."

The Ninth Circuit's order of November 5, 1986, which denied reconsideration of the order of August 19, 1986, does nothing to clarify the Circuit Court's reasoning, as this order states in its entirety: "Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied."

CONCLUSION

There is no statutory or decisional authority which permits the Ninth Circuit to shirk its mandamus jurisdiction and avoid evaluating Plaintiff's well-documented charges of systematic obstruction of justice in this politically sensitive case. Indeed, except in those few cases falling within the Supreme Court's original jurisdiction, the Supreme Court depends on lower courts to perform the

fact-finding function, and where flagrant misconduct by a district court is alleged, the responsibility for determining the truth of such allegations obviously belongs to the circuit court of appeals.

The Supreme Court does have the power to order that appropriate steps be taken to secure a record which brings the issues in a case into proper focus, but to embroil the Supreme Court in procedural disputes, except as a last resort, would require an unwarranted diversion of effort from its primary policy-making function. Supreme Court Rule 26 protects the time of the High Court by requiring that any mandamus request be submitted first to the circuit court.

Respectfully submitted,

/s/ MICHAEL J. HALLIWELL

Michael J. Halliwell
Plaintiff-Appellant
In Propria Persona

Dated: December 1, 1986

PLAINTIFF'S NOTICE OF APPEAL

SEEKING ISSUANCE OF A WRIT OF MANDAMUS

BY THE NINTH CIRCUIT COURT OF APPEALS

TO THE EASTERN DISTRICT OF CALIFORNIA

DISTRICT COURT

FILED BY MAIL ON AUGUST 31, 1985

WITH EASTERN DISTRICT OF CALIFORNIA

DISTRICT COURT

GENERAL GROUNDS FOR APPEAL

Plaintiff hereby appeals the Order of August 5, 1985 on the substantive ground that it constitutes a refusal by the three-judge court to adjudicate politically sensitive issues as required by Swift & Company v. Wickham (1966) 382 U.S. 111, 119 and on the procedural ground that the Order refuses to follow the briefing requirements of Local Rule 230 and Wong v. Bell, 642 F.2d 359 (9th Cir. 1981). Since a major cause of persistent violations of due process of law in this case is Judge Karlton's invasion of the province of a three-judge court, the proper remedy is an application for a writ of mandamus to the Ninth Circuit Court of Appeals. See Idlewild Bon Voyage Liquor Corp. v. Epstein (1962) 370 U.S. 713, 715-716. Mandamus is equally appropriate to confine Judge Karlton to "a lawful exercise of his

prescribed jurisdiction" and to compel the three-judge court "to exercise its authority when it is its duty to do so." See Will v. United States (1967) 389 U. S. 90, 95.

In Gaffney v. Cummings (1973) 412 U.S. 735, 753 the U.S. Supreme Court notes that even if a reapportionment plan were drafted without taking political consequences into account "it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." Emphasis added. Likewise, whether or not this court was aware of the effect its abrupt termination of this action would have on Plaintiff's ability to secure meaningful appellate review of this court's disposition of the case, it is certainly aware of it now, and in

light of the perfunctory nature of the order of August 5, 1985, this effect is clearly intentional. Therefore it is obvious that Plaintiff must resort to mandamus proceedings to secure a minimally adequate record on which to appeal this court's dismissal of his congressional and state legislative claims. On the other hand, since this court has neither taken action on Plaintiff's Board of Equalization claim nor explicitly refused to do so, mandamus proceedings with respect to this aspect of the case would be premature.

1. EXPLANATION OF DISMISSAL OF CONGRESSIONAL CLAIM

In Assembly v. Deukmejian (1982) 30 Cal.3d 638 the California Supreme Court ruled:

> "A weighing of the diverse and at times conflicting factors involved in this case leads to the

> conclusion that the election plans developed by the Legislature must be used, as a temporary measure, in the 1982 legislative elections." Id. at 665.
>
> "This court's decision affects only the districts to be used temporarily for the 1982 elections." Id. at 671. Emphasis in original.

The District Court should be required to explain why such a one-election court order does not meet the District Court's own definition of issues "capable of repetition, yet evading review" stated at 4 of the order of July 9, 1985:

> "Certain controversies are of such short duration that strict application of the mootness doctrine would prevent them ever from being brought to court for resolution, notwithstanding the injuries they cause."

Such an explanation should specify how the Court's finding of mootness is reconciled with the holding of Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13:

> "[E]ven if the order were clearly limited to the 1980 election year, the controversy would be properly

> before us as one 'capable of repetition, yet evading review.'"

2. RULING BY THREE-JUDGE COURT ON PLAINTIFF'S MOTION FOR A DECLARATORY JUDGMENT ON SENATE DISTRICT MISNUMBERING

Plaintiff's senate district misnumbering grievance, which deals with his complaint that some districts were disenfranchised to provide others with double representation, has been the major issue in these proceedings, and this court's jurisdiction over this issue has been clear-cut from the outset. Nevertheless the District Court refused to act before the November 1982 General Election on Plaintiff's proposal to prevent double representation by cancelling premature elections in senate districts which already were represented by carry-over incumbents. The District Court then postponed for another year any ruling on

Plaintiff's proposal to unseat the extra senators from the misnumbered districts because the misnumbering issue involved

> "problems that appear to implicate fundamental constitutional doctrines and that also appear never to have been presented squarely to another federal court. These problems are sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the Court."

(See order of April 19, 1983 at 2.) Finally the District Court declined to grant injunctive relief from senate district misnumbering and refused to rule on Plaintiff's motion for declaratory relief because

> "Plaintiff has no chance of success on the merits, because even if he were to . . . convince us of the correctness of his vote acceleration and deferral theory . . . [this is a] hypothetical problem which time alone will very shortly resolve."

(See order of March 27, 1984 at 12.) Clearly the disenfranchisement of senate district by the postponement of scheduled elections by odd-even number switches

fits the District Court's own definition of grievances "capable of repetition, yet evading review," being of shorter duration than the process of adjudication. Therefore the District Court should be required to rule on Plaintiff's long-pending motion for a declaratory judgment on senate district disenfranchisement and double representation.

3. RULING BY THREE-JUDGE COURT ON RECONSIDERATION OF DISMISSAL WITH PREJUDICE OF SENATE CLAIM

In the order of July 1, 1982 (at 9) Judge Karlton rules:

> "I do not mean to suggest that the alleged distortion of election districts to serve political ends is irrelevant to the question of whether deviations from absolute population equality are justifiable under the standards set out in Wesberry v. Sanders, 376 U.S. 1 (1964) and Mahan v. Howell, 410 U.S. 315 (1973)."

This holding is affirmed by the full

Court in the order of April 19, 1983 (at 4). Nevertheless the order of March 27, 1984 (at 5) reverses this position and rejects Plaintiff's claim based on systematic underpopulation of Democratic senate districts and systematic overpopulation of Republican senate districts:

> "Plaintiff's allegation that the apportionment plan discriminates against Republicans avails him nothing. There is no authority for the proposition that a reapportionment plan that discriminates on the basis of political party offends the Equal Protection Clause."

The District Court should be required to explain how it reconciles its new holding with the requirement of Roman v. Sincock (1964) 377 U.S. 695, 710 that even minor population disparities among state legislative districts must be "free from any taint of arbitrariness or discrimination." Since Plaintiff has been prevented from documenting his senate district population disparity claim by the

refusal of the Senate to provide essential population data under its sole control, the District Court should be required to explain why (according to the order of March 27, 1984 at 7) it would be "idle" to allow Plaintiff to pursue this grievance.

4. RULING BY THREE-JUDGE COURT ON RECONSIDERATION OF SUMMARY JUDGMENT GRANTED TO THE ASSEMBLY

The District Court's order of March 27, 1984 (at 15) granted what amounted to a default summary judgment to the Assembly because

> "The Plaintiff vigorously disputes the figures proffered by the Assembly, but not in any legally cognizable way. The United States Court of Appeals for the Ninth Circuit has repeatedly held that a party opposing another's motion for summary judgment must counter the moving party's affidavits or declarations with affidavits or declarations of his own, and failure to do so will result in the granting of the motion."

However, Plaintiff supplemented the Quinn affidavit (which the Court had overlooked) with documentation proving population disparities among the contested assembly districts exceeded the 10% the Court required to establish a constitutional violation. This supplemental documentation showed that assembly district population disparities remained above the 10% threshold even when all authorized corrections and any additional textually demonstrable drafting errors were taken into account. The Assembly replied in response to this demonstration, "Plaintiff's tedious analysis of the Quinn affidavit and his argument that the corrections to the 1982 districts were not authorized are irrelevant." (See 13 Record 440.) The District Court should be required to rule on Plaintiff's motion for reconsideration of the Assembly's summary judgment (on

which briefing was completed more than a year ago). This ruling should take into account the well-established principle that if a law is unconstitutional on its face it cannot be saved simply because it is not applied in an unconstitutional manner and also the fact that the Assembly has refused to provide essential population data under its sole control, thereby precluding verification of the population claims upon which the Assembly's summary judgment is based.

5. RULING BY THREE-JUDGE COURT ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

The District Court has simply refused to consider most of Plaintiff's claims without taking the slightest notice of standards applicable to the exclusion of claims at the pleading stage. In Oneida Indian Nation v. County

of Oneida (1974) 414 U.S. 661, 666-667 the U.S. Supreme Court ruled that excludable claims must be "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court." In Goosby v. Osser (1973) 409 U.S. 512, 518 the Supreme Court defines jurisdictionally insubstantial claims in the most unequivocal terms:

> "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' [citation]; 'wholly insubstantial,' [citation]; 'obviously frivolous,' [citation]; and 'obviously without merit' [citation]. The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not

> render them insubstantial for the purposes of 28 U.S.C. § 2281 [now § 2284]. A claim is insubstantial only if 'its unsoundless so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' [Citations.]"

The three-judge tribunal conducting proceedings in Halliwell v. Eu should be required to rule on Plaintiff's April 7, 1984 motion to amend his complaint; if any of the claims raised in Plaintiff's proposed supplemented pleading (13 Record 363-411) are deemed to be insubstantial the Court should clearly identify the excluded claims and justify their exclusion. The District Court has persistently refused to consider Plaintiff's challenge to the 1983 redistricting plans even though these districts perpetuate the grievances challenged in Plaintiff's original complaint, and the Court has never ruled on Plaintiff's motion to

explicitly include these districts within the scope of an amended complaint. The right to challenge a successor redistricting plan in a reapportionment lawsuit is affirmed by the U.S. Supreme Court in Crowell v. Mader (1980) 444 U.S. 505, 506; the District Court should be instructed to obey this ruling. The District Court also should be instructed to follow Foman v. Davis (1962) 371 U.S. 178, 182 with respect to all of Plaintiff's claims which are not shown to be jurisdictionally insubstantial. "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded."

6. RULING BY THREE-JUDGE COURT ON JOINDER OF CALIFORNIA SUPREME COURT

The District Court has acknowledged (see 15 Record 162) that Plaintiff alleges purposeful discrimination by the

California Supreme Court in its selection of redistricting plans, and the District Court has also acknowledged the pivotal importance to Halliwell v. Eu of the California Supreme Court's handling of the issue of district populations (see order of November 1, 1982 at 5). Moreover, at the February 16, 1983 hearing the Court affirmed that for purposes of determining whether a litigant should be allowed to present his proofs his allegations must be assumed to be true. (See hearing transcript at 40-41.) Thus for purposes of Plaintiff's motion to join the California Supreme Court as a defendant the three-judge tribunal conducting proceedings in Halliwell v. Eu must accept as true Plaintiff's contention that the California Supreme Court has aided and abetted an "alleged conspiracy by various Democrat-appointed judges to obstruct adjudication of constitutional

challenges to the various contested redistricting plans." (See 15 Record 377.) "[O]n motions by plaintiff for the addition of a party defendant, the allegations in the motions should be taken as true." Looper v. Colonial Coverlet Co. (1939) 29 F.Supp. 121, 121. The District Court should be required to rule on Plaintiff's April 7, 1984 motion for joinder of the California Supreme Court and explain its decision in terms of the nature of Plaintiff's allegations and the holding of the U.S. Supreme Court in Cooper v. Aaron (1958) 358 U.S. 1, 16-17:

> "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'state' shall deny to any person within its jurisdiction the equal protection of the laws. 'A state acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore must mean that no agency of the state, or the officers or agents by whom its powers are exerted shall

> deny to any person within its jurisdiction the equal protection of the laws.' Brinkerhoff-Faris Co. v. Hill 281 U.S. 673, 680 (1930)."

7. PENDING MOTIONS TO COMPEL DISCOVERY

Plaintiff's formal inquiries of July 2, 1984 to the Assembly, the Senate and the Secretary of State were preceded by a long struggle to secure the information sought by voluntary means. (See 14 Record 150-158, 191-197, 424.) Plaintiff's motion to compel responses to his discovery requests was delayed for eight months on account of Judge Karlton's protracted consideration of preliminary motions. (See 15 Record 59-60.) Further delay ensued when Judge Ramirez refused to consider Plaintiff's motion to compel discovery (see 14 Record 8-11), Magistrate Mix subsequently put off issuing a ruling on Plaintiff's motion (see 15 Record 180-187), and Defendants caused

further postponements in consideration of the motion (see 15 Record 346). Two days before the Secretary of State was due to file crucially important materials explaining her failure to provide meaningful responses to Plaintiff's discovery requests (see 15 Record 376) and the Assembly was due to respond to Plaintiff's contention that "The order of March 27, 1984 cannot justify refusal by the Assembly to respond to Plaintiff's inquiries inasmuch as the Assembly secured its summary judgment by fraud and misrepresentation" (see 15 Record 12-17), the District Court (acting without benefit of any motion seeking termination of the action and totally ignoring Plaintiff's unresolved Board of Equalization claim and also without ruling on reconsideration motions relating to assembly and senate claims on which briefing was completed on August 6, 1984) abruptly

terminated proceedings on July 9, 1985. Subsequently the Court (in its order of August 5, 1985) refused to allow briefing on this sua sponte termination even though the order of July 9 relied upon circumstances and cases never addressed by any of the Defendants. The District Court should be required to complete briefing on Plaintiff's discovery motions and also to complete briefing on the factual issues raised by Plaintiff's congressional motion of April 20, 1984. (See 15 Record 373-376.)

Subsequent to the completion of related briefing the District Court should be required to rule on Plaintiff's right to discovery in light of the fact that he has never been allowed any discovery and the fact that Defendants have voluntarily supplied no information at all on any of the contested districts but have instead resorted to unverifiable claims

or (more usually) simply ignored factual issues. The District Court's discovery ruling should be in conformity with the mandates of Hickman v. Taylor (1947) 329 U.S. 495, 500-501 that relevance for discovery purposes

> "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . . Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. . . . [D]eposition-discovery rules are to be accorded a broad and liberal treatment [so that] civil trials in the federal courts no longer need be carried on in the dark."

8. RESTORATION OF NORMAL COMMUNICATIONS

Plaintiff's ability to conduct his case has been unfairly hampered for the past three years by the fact that he is not allowed to communicate with the staff of the Judge in operational control of

proceedings even though Defendants' counsel are allowed to communicate freely with that Judge's law clerks. (See 14 Record 1.) Judge Karlton's policy of no communication with Plaintiff has led to numerous procedural foul-ups which have interfered with proper adjudication of the case. See, e.g., order of February 8, 1983. Judge Karlton's ban on communications by Plaintiff therefore should be vacated by the Court of Appeals.

CONCLUSION

This appeal is necessary now in order to prevent the 1986 elections from going forward, as did the 1982 and 1984 elections, without any adjudication of Plaintiff's challenge to the constitutionality of the districts used in them.

This appeal does not seek reversal of any substantive decisions by the District Court, but only the enforcement of

Plaintiff's Due Process rights in the eight areas explained above so that a proper factual record may be compiled which will allow the U.S. Supreme Court to properly evaluate the merits of Plaintiff's claims.

This appeal may not properly be used by the District Court as an excuse for continuing its refusal to act on the procedural issues raised in this appeal. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." Hormel v. Helvering (1941) 312 U.S. 552, 557. "[T]he procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions." DiBella v. United States (1962) 369 U.S. 122, 124.

Respectfully submitted,

/s/ MICHAEL J. HALLIWELL

Michael J. Halliwell
Plaintiff-Appellant
In Propria Persona

Dated: August 31, 1985

PROOF OF SERVICE BY MAIL

I, Betty Halliwell, am a citizen of the United States and am self employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My home address is that of 2930 Colorado Aven. #D-18, Santa Monica, California.

On August 31, 1985 I served the attached notice of appeal via first-class mail with postage fully prepaid at Santa Monica, California on the attorneys of record for defendants March Fong Eu, Secretary of State of Califoria; Chief Justice Rose E. Bird; intervenors, Assembly and Senate of California; and the member of the three-judge panel and Clerk of the Court:

Chief Justice Rose E. Bird
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Deputy Atty. General Carol Hunter
1515 K Street, Suite 511
Sacramento, CA 95814

The Hon. Lawrence K. Karlton
Chief Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Raul A. Ramirez
District Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Anthony M. Kennedy
Circuit Judge
Ninth Circuit Court of Appeals
555 Capitol Mall, Suite 1400
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2400 Avenue of the Stars, Fourth Floor
Los Angeles, CA 90067

Executed on August 31, 1985 at Santa Monica, California. I declare under penalty of perjury, pursuant to California law, that the above is true and correct.

_____

Betty Halliwell, Ph.D.
(Signature)

PLAINTIFF'S MEMORANDUM ON THE NINTH CIRCUIT'S HANDLING OF HIS APPEALS

(Portion Dealing with Mandamus Appeal C.A. 85-2496)

Submitted to Chief Judge of the Ninth Circuit James R. Browning

FILED BY MAIL ON APRIL 30, 1987 WITH NINTH CIRCUIT COURT OF APPEALS

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III. PLAINTIFF'S MANDAMUS APPEAL (C.A. 85-2496)

The Ninth Circuit took no action on C.A. 84-1859, and subsequently the District Court apparently decided that it was no longer necessary to even pretend to attempt to go through the motions of following due process of law.

Section A infra summarizes the disposition of each of the issues which were pending when C.A. 84-1859 was consigned to limbo by the Ninth Circuit. Subsection 1 sets forth the circumstances of Judge Karlton's April 4, 1985 ruling disallowing Plaintiff's challenge to the 1983 districts on the patently false ground that the proposed amendment and supplementation of Plaintiff's complaint "add nothing to the claims already rejected by the Court in previous motions." Subsection 2 focuses on the elimination of the California Supreme Court as a

defendant by the same order of April 4, 1985 (even though the California Court was the state agency which had adopted the contested districts) because, according to Judge Karlton, "No claim is or can be stated against the Supreme Court with respect to the issues in this case." Subsection 3 deals with Plaintiff's motions to compel discovery from the Assembly, Senate and Secretary of State which were referred by the District Court to Magistrate Mix. Two days before the filing deadline for opposition to Plaintiff's motions slated for hearing by Magistrate Mix on July 25, 1985, the District Court ruled sua sponte that "this action is DISMISSED in its entirety, without leave to amend" (order of July 9, 1985). Subsection 4 discusses the three-year-long delay by the District Court in ruling on Plaintiff's congressional claim (during which time Plain-

tiff's proposed remedy became obsolete), followed by the dismissal of this claim by the order of July 9, 1985 (without a hearing or even the completion of briefing called for by the Court's prior order), on the ground that Plaintiff's claim was moot because "the relief sought has become impossible to grant due to the passage of time" (even though revised remedies similar to those proposed by Plaintiff for other districts were still feasible). Subsection 5 is devoted to the termination of consideration of Plaintiff's Assembly claim by the July 9, 1985 sua sponte termination of the action "in its entirety." This was done without any ruling by the Court on the issues raised in the briefing on this claim, which had been completed 11 months prior to the Court's termination action. Subsection 6 reviews the refusal of the District Court to rule on Plaintiff's

motion to reconsider its dismissal with prejudice of his senate claims by the order of March 27, 1984. The Court justified this dismissal by saying that "the Court is not prepared to grant the Plaintiff any relief [even] assuming, arguendo, a constitutional violation," so "it would be a futile act to allow Plaintiff leave to amend his complaint." Subsection 7 notes the flat refusal of the District Court to take any action at all on Plaintiff's Board of Equalization claim and the Court's absolutely untrue assertion (in the order of July 9, 1985) that this claim had "been dismissed by the order of March 27, 1984."

Section B infra summarizes the treatment by the Ninth Circuit of Plaintiff's mandamus appeal of August 31, 1985, which petitioned for relief from the procedural mishandling of his case outlined in Section A supra. Subsection

1 briefly reviews actions by the District Court immediately preceding Plaintiff's mandamus petition to the Ninth Circuit. Subsection 2 discusses the unexplained refusal by the Ninth Circuit to heed the mandate of F.R.A.P. 21(b) and its issuance of totally obscure orders transferring jurisdiction over Plaintiff's appeal to the U.S. Supreme Court. Subsection 3 deals with Plaintiff's unsuccessful efforts to secure clarification of the cryptic order of November 5, 1986, which states in its entirety, "Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied." Subsection 4 is devoted to Plaintiff's motions in response to the order of February 26, 1987, which denied clarification of the order of November 5, 1986. Subsection 5 focuses on the refusal by the panel which issued the order of

February 26, 1987 to allow forwarding to the active-service judges of the Ninth Circuit (as required by F.R.A.P. 35) of Plaintiff's en banc petition seeking reconsideration of the order of February 26. Subsection 6 notes the refusal of a member of this same Ninth Circuit panel to allow filing of Plaintiff's Notice of Appeal from the actions and refusals to act outlined in subsections 2-5 supra.

A. Dispositions by the District Court

1. Motion for Leave to Amend

a. Delay in Adjudicating Challenge to Original Districts

Plaintiff summarizes his unsuccessful efforts to secure prompt adjudication pursuant to 28 U.S.C. § 2284 so that the constitutionality of the contested districts could be determined before the Legislature elected in 1982 was able to perpetuate the challenged constitutional defects in a redistricting plan designed to perpetuate itself in office for the remainder of the decade:

> "In urging the District Court to act expeditiously Plaintiff warned on March 10, 1982:
>
> > 'According to the [California] Supreme Court's decision, 1982 legislative elections will be conducted in districts set forth by the Legislature even though all three redistricting bills were blocked by referendum petitions containing twice the necessary number of signatures. Then, even if A.B. 301, S.B. 99 and A.B. 300 are all voted down, the districts

therein will remain in effect for the November general election. Legislators elected in these districts will then be able to pass another redistricting plan to preserve their seats and ignore any referendum petitions against these new districts until after they are used in the next election." 1 Record 222-223.

"Plaintiff affirms at 15 Record 188-189:

'At the outset of proceedings, faced with a complaint alleging deliberate sabotage of the political process to secure partisan advantage, Judge Karlton allowed Defendant to avoid filing a responsive pleading on account of an utterly frivolous series of challenges to the adequacy of service of process. When Plaintiff tried to secure implementation of the expedited consideration requirement of 28 U.S.C. § 2284 with a motion to establish a calendar for consideration, Judge Karlton simply refused to act on the grounds that "You can't just invent motions."

'When Plaintiff sought to bar further irreversible steps to implement the contested districts until their constitutional defects had been ameliorated to the extent possible by means of whole-precinct swaps among districts, Judge Karlton gave priority to his vacation plans, thereby

delaying consideration of this TRO proposal for a critically important two weeks. After Defendant had completed all the activities Plaintiff sought to restrain between notification of Plaintiff's motion and the hearing on it, Judge Karlton refused to consider Plaintiff's proposals to undo these actions on the ridiculous ground (when federally protected voting rights are at stake) that "federal courts have no authority to tell local officials how to conduct elections."'

"Plaintiff affirms at 15 Record 190-191:

> 'The full three-judge panel refused to consider any of Plaintiff's motions from the time the panel was appointed by Judge Browning shortly after Judge Karlton's order of July 1, 1982 until one week before the November General Election; then the Court ruled that it was too late to interfere with the elections process. When the lame-duck Governor called an illegal special session on redistricting the Court refused Plaintiff's request for an emergency hearing and then postponed all action until after the Legislature elected from the districts rejected in the June referenda had enacted new referendum-proof districts to perpetuate itself in office.'"

(16 Record 446-448.)

b. Invalidation of Plaintiff's August 1983 Supplemental Complaint

Plaintiff reviews the procedural subterfuge used by the Court to avoid taking cognizance of Plaintiff's challenge to the districts enacted by the Legislature elected from the originally challenged districts:

> "In August 1983 the Court was still considering Rule 12(b)(6) (Fed.R.Civ.Proc.) dismissal motions, and no responsive pleading had been filed by any party. Therefore when the Court's 'most careful and thorough consideration' of the issues argued at the February 16, 1983 hearing stretched into August 1983 Plaintiff exercised his right under Rule 15(a) (Fed.R.Civ.Proc.) to unilaterally amend his complaint once.
>
> "Plaintiff's supplemental pleading (8 Record 510-543) showed that all of the constitutional flaws in the 1982 redistricting plans had been perpetuated or aggravated in the districts adopted at the December 1982 special session and signed by the lame-duck Governor in January 1983. The congressional districts were 90% unchanged from those used in 1982. The senatorial districts were 91% unchanged from their predecessors, and the assembly districts were 92% unchanged. All

three sets of districts also had much larger population disparities than the districts which they replaced.

"No one challenged Plaintiff's right to file his supplemental complaint, and when in December 1983 Plaintiff filed proposals for injunctive relief directed to the 1984 elections based on the perpetuated constitutional flaws noted in his August 1983 supplemental complaint, neither the Court nor any defendant challenged his right to do so.

"But the order of March 27, 1984 ruled that Plaintiff's March 11, 1982 inclusive brief had exhausted his right to unilaterally amend his complaint and therefore refused to recognize his August 1983 supplemental complaint. The order then 'declines to take cognizance of the Plaintiff's motions that seek an adjudication of the districts created by the 1983 redistricting plan . . . [because] Plaintiff is not free to seek an adjudication of disputes not fairly presented by the complaint.'

"The issue arose because at the beginning of the lawsuit Plaintiff had mistakenly labeled a document designed to facilitate early intervention by parties to Assembly v. Deukmejian as an 'Amended and Inclusive Complaint.' This document was served on those parties following Plaintiff's filing of his opening complaint. The opening complaint was 17 pages long and simply provided a concise statement of each of Plaintiff's claims; the inclusive brief interspersed these identical

claims with 200 pages of supporting citations and documentation to make all potential intervenors aware of the scope of this action and to facilitate the prompt adjudication required by 28 U.S.C. § 2284.

"The order of March 27, 1984 changes its definition of Plaintiff's March 11, 1982 inclusive brief in different contexts. When served on the California Supreme Court it was ruled to be not really a complaint because it was too bulky: 'the document bears a passing resemblance to a complaint, though it can hardly be characterized as a short and plain statement of the facts entitling the pleader to relief.' Yet the same document was enough of a complaint in the eyes of the Court to exhaust Plaintiff's right to unilaterally amend. Plaintiff had no way to anticipate such a ruling, since the order of July 1, 1982 had determined that the inclusive brief was not really a complaint: 'A complaint may not properly double as an inclusive brief.' (4 Record 56.)

"Thus the issue of whether Plaintiff had a right to bring the 1983 districts before the Court became a shell game in which the Court (a) refused to consider the State Supreme Court properly joined because the document served upon it was too bulky to be a complaint, and yet (b) refused to consider the districts perpetuating for the rest of the decade the constitutional defects alleged in Plaintiff's original complaint because the document served on the State Supreme

Court was a unilaterally amended complaint." (17 Record 117-119.)

Plaintiff reviews tactics previously used by the Court to avoid taking cognizance of the challenge to the new districts raised in his August 1983 supplemental complaint:

> "Prior orders of the Court had suggested that Plaintiff could readily have secured a ruling on his right to challenge these districts.
>
> "What would have been the order of December 17, 1982 had it been promptly filed states:
>
> 'If Plaintiff desires to supplement his complaint, F.R. Civ.P. 15(d), he may, of course, file a motion for leave of court. Such a motion will be heard on the briefing schedule set by the Court's order after status conference [order of December 16, 1982], if properly noticed and briefed.' (7 Record 526.)
>
> According to the order of December 16, 1982:
>
> '[Motions and briefs] shall be submitted according to the following schedule, and only according to that schedule: the motions shall be filed and served with supporting memoranda not later than January 7, 1983.' (6 Record 275-275.)
>
> "But Plaintiff could not pos-

sibly have filed a motion on this schedule, since the schedule was filed on February 8, 1983. (See 7 Record 524.)

"When Plaintiff received the order of February 8, 1983 on February 11 it did not appear that the precedence given to the order of December 16, 1982 over the right to file motions under Local Rules (see 7 Record 526) would seriously delay a motion for leave to amend to challenge the 1983 districts. The order of December 16, 1982 required:

> 'All decisions regarding other matters in this case are now deferred pending disposition of the motions to be heard by the Court on February 16, 1983.' (6 Record 276.)

Plaintiff had no idea that disposition of motions heard by the Court on February 16, 1983 would be delayed so long that he would not have time to seek leave to amend well in advance of the 1984 elections.

"The order of January 28, 1983 promised that at the February 16, 1983 hearing, 'Parties may then request the Court to enter an order scheduling the filing of briefs and hearing of other appropriate motions.' (7 Record 358.) Emphasis added. But what seemed to be an ample opportunity to challenge the 1983 districts within the framework required by the Court began to dwindle when the Court did not return as expected after the following remarks at the February 16, 1983 hearing.

'JUDGE KARLTON: Thank you

sir. The Court will stand in recess.

'MR. HALLIWELL: Your Honor, in your modification of order following status conference, there has been some reference that some arrangement --

'JUDGE KARLTON: We will issue an order.' (Hearing Transcript at 83.)

"Opportunity dwindled further when the order of April 19, 1983 continued the Court's protracted contemplation of motions argued on February 16, 1983 'sufficiently novel, subtle, and grave as to demand the most careful and thorough consideration by the Court' (8 Record 118) but did not include a provision for filing 'other appropriate motions,' as promised at the February 16, 1983 hearing." (17 Record 128-130.)

c. Judge Karlton's Ruling on Plaintiff's Motion for Leave to Amend

Plaintiff discusses action taken by the Court on his April 10, 1984 motion for leave to amend his complaint:

"When the Court refused to act promptly on Plaintiff's motion for leave to amend and a court clerk informed him that other motions would preclude action until June 4, 1985, Plaintiff complained at 12 Record 385:

'Obviously it is a perversion of judicial procedure

> to delay until June 4, 1985 a decision on whether to adjudicate Plaintiff's challenge to the constitutionality of districts to be used in the June 5, 1984 elections. If this court is unwilling to consider Plaintiff's grievances regarding the 1984 districts it should so rule immediately, enabling Plaintiff to appeal immediately under 28 U.S.C. § 1292.'

"The full court refused to hear Plaintiff's motion for leave to amend and instead insisted that the motion should have been placed on Judge Karlton's calendar pursuant to Local Rule 113. Plaintiff criticized this tactic at 12 Record 387-388:

> 'At no time in the more than two years of these proceedings has a hearing been held under the provisions of Local Rule 113. On both occasions when this procedure was followed the scheduled hearings were cancelled. [Supporting citations of case record.]
>
> 'The pending motion attacking the sufficiency of Plaintiff's complaint is to be accorded consideration by the full panel, yet according to the [clerk's notice] Plaintiff's motion to amend his complaint is to be heard by Judge Karlton alone. But the order of July 1, 1982 provides at 4 Record 40 that "all further proceedings in this case shall be presided over by

a three-judge court." Emphasis added.'

"Plaintiff affirms at 15 Record 192:

'The only authority the full Court has ever delegated to Judge Karlton was to preside over the December 6, 1982 status conference and "to make all determinations and issue all orders necessary to and resulting from that conference." Yet the full Court has never established a procedure for handling motions addressed to it and has simply ignored many such motions for months and even years. After nearly two years of the full Court's refusing to discharge its responsibilities under 28 U.S.C. § 2284 ("[§ 2284] provides for three judges . . . to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas. . . ." Swift & Company v. Wickham (1966) 382 U.S. 111, 119) Plaintiff protested:

> "[I]f the full panel should delegate any further operational authority to Judge Karlton without first addressing the propriety of his past stewardship of the case it will provide yet more evidence that judicial in-group solidarity has taken precedence over their oaths to uphold and

defend the Constitution."'

"When Plaintiff's motion for leave to amend was heard by Judge Karlton on August 27, 1984 there was some discussion of the impact of Karcher v. Daggett (1983) 103 S.Ct. 2653 on Plaintiff's partisan gerrymandering claim, following which Judge Karlton indicated that he would deny leave to amend. Plaintiff protested, 'What happened to my challenge to the 1984 districts?' Judge Karlton then inquired of defense counsel, 'Does the proposed complaint challenge the 1984 districts?' When told that the complaint did so (in fact this was the main issue noted in Defendant's opposition; see 13 Record 503-508, 515-521 and 529-533), Judge Karlton seemed astonished and quickly decided to take Plaintiff's motion under advisement. See Plaintiff's affidavit at 14 Record 9.

"Judge Karlton held Plaintiff's motion under advisement for seven months before denying it on April 4, 1985. This added delay certainly confirms Plaintiff's assessment of the Court's motivation which he made on April 20, 1984 at 12 Record 393:

> 'Viewed against the background of this court's prior actions, it seems reasonable to suggest that the attempt to apply Local Rule 113 to Plaintiff's latest motions is yet another tactic to delay these proceedings and thwart efforts to obtain any relief.'

"Such a conclusion is further supported by the superficial nature

of Judge Karlton's ruling, which is simply a footnote tacked onto a motion on another subject lodged with the Court on August 31, 1984. The full text of Judge Karlton's ruling denying leave to amend is:

> 'To the degree Plaintiff seeks to amend or supplement his complaint, the motion is also DENIED, as the amendments or supplementations add nothing to the claims already rejected by the Court in previous motions.' 14 Record 3.

"Plaintiff protests the Court's continued refusal to address the issue of the 1983 districts at 14 Record 9-10:

> 'The 1983 districts were the central focus of Plaintiff's motion for leave to amend, inasmuch as this Court ruled in its order of March 27, 1984:
>
> > "The Court likewise declines to take cognizance of the Plaintiff's motions that seek an adjudication of the districts created by the 1983 redistricting plan. . . . The Plaintiff is free, of course, to move for leave of court to file a supplemental complaint, F.R. Civ.P. 15(d) but he has not done so." 12 Record 255.

[Footnote: In fact, Plaintiff had not been free to file a motion for a supplemental complaint, as the Court's order of February 8, 1983 precluded the filing of any motions until the Court had disposed of mo-

tions then pending; and the Court did not do this until this order of March 1984. 13 Record 611-613.] To deny Plaintiff's motion for leave to amend without addressing the merits of the most important aspect of that motion is a plain denial of Plaintiff's right to due process of law: [citation].'" (16 Record 449-453.)

d. Evasion of the Leave-to-Amend Issue by the Full Court

Plaintiff then reviews the final episode in the judicial shell game with respect to the 1983 districts:

"Plaintiff was entitled to refer Judge Karlton's denial of leave to amend to the full panel pursuant to 28 U.S.C. § 2284(b)(3), but his efforts to do so were cut short by the July 9, 1985 sua sponte dismissal of the action in its entirety. Without mentioning the Court's refusal to rule on Plaintiff's motion for leave to challenge the 1983 districts the order of July 9 justified dismissing the case because '[The 1984] election, and the plan under which it was conducted, is not before the Court.' 15 Record 200.

"In his motion for reconsideration of the order of July 9 Plaintiff protests (at 15 Record 238):

'[T]he Court is evading a crucial issue by refusing to look at the 1983 districts by deny-

> ing Plaintiff leave to amend his complaint to challenge the 1983 districts. Thus this denial is clearly contrary to Rule 15(a) Fed.R.Civ.Proc., which provides that such leave "shall be freely given when justice so requires."'

"After reviewing the evasive tactics used by the Court to avoid consideration of the districts used to conduct the 1984 elections, Plaintiff concludes (at 15 Record 240):

> 'Thus the 1984 districts are "not before the Court" because the Court has turned its back on them and thereby ignored Rule 15(a) of the Federal Rules of Civil Procedure.'

"Although Local Rules provided for the filing of opposition and rebuttal on Plaintiff's motion to reconsider the order of July 9, the Court cut short briefing and summarily denied the motion. In its order of August 5, 1985 the Court ruled:

> 'Plaintiff has filed a motion for reconsideration of the Court's order of July 9, 1985, which dismissed this action. The Court has determined that it may dispose of this motion without the benefit of oral argument. Accordingly, the motion is hereby submitted on the record and papers currently before the Court. See Local Rule 230(h), E.D. Cal. (1984).
>
> 'Plaintiff's basis for seeking reconsideration is a

> disagreement with the Court's reasoning in disposing of this case. This is insufficient. See Local Rule 230(k). The appropriate method for challenging this Court's reasoning is an appeal to an appropriate tribunal.
>
> 'Accordingly, Plaintiff's motion is DENIED without leave to renew it.
>
> 'IT IS SO ORDERED.' 15 Record 353-354."

(16 Record 454-455.)

2. Plaintiff's Motion for Joinder of the California Supreme Court

Plaintiff argues in support of retaining the California Supreme Court as a defendant in Halliwell v. Eu:

a. "Court's Pivotal Role in Adoption of the Contested Districts

> "In adopting the Legislature's redistricting plans which were blocked by referendum petition and in refusing to require reapportionment of BOE districts which were two years older than the then-existing congressional and state legislative districts, the California Supreme Court abrogated numerous state and federal constitutional requirements. The resulting configurations of all four types of districts were biased in favor of Democratic candidates, yet the Democrat-dominated Cali-

fornia Supreme Court did not even attempt to justify the glaring constitutional flaws in the districts which it adopted. No mention was made of gross violations of the requirements of Article XXI of the California Constitution by all four plans, and Assembly v. Deukmejian (1982) 30 Cal 3d 638 was silent on such vital issues as senate district disenfranchisement and double representation, congressional district population disparities, and the Secretary of State's substitution of different versions of most assembly districts. The California Supreme Court rejected BOE redistricting without issuing any opinion at all. Thus any defense based on the bare text of the Court's opinions will be inadequate. In order for the federal court to evaluate such a defense, the California Supreme Court must explain the reasoning by which it determined that practical necessity required the adoption of such flagrantly unconstitutional districts. See 12 Record 6-7.

[b.] Issues Raised in Briefing on Plaintiff's Joinder Motion

"Plaintiff argues in his August 18, 1984 'Rebuttal in Support of Motion for Joinder of the California Supreme Court':

> 'Counsel for the California Supreme Court cites Brown v. Supreme Court of Nevada (D. Nev. 1979) 476 F.Supp. 86, 98 as holding:
>
> > "A state supreme court is not a 'person' within the

> meaning of 42 United States Code Section 1983, and thus, as an agency of the state, is immune from suit under both the Eleventh Amendment and 42 United States Code Section 1983."

But the Brown opinion also notes:

> "However, plaintiff may bring an action for prospective injunctive relief against officials of the state; such an action violates neither the Eleventh Amendment nor 42 U.S.C. § 1983." Id. at 89.
>
> . . . . .
>
> "Plaintiff shall name the individual justices of the Nevada Supreme Court only, and shall sue for injunctive relief only based on the theory of denial of due process in violation of the Fourteenth Amendment to the United States Constitution." Id. at 90.'

(13 Record 560-561.)

'The California Supreme Court seeks to imply a broader limitation by citing the following passage from Pennhurst [v. Halderman (1984) 104 S.Ct. 900]:

> "It is clear, of course, that in the absence of consent a suit in which a state or one of its agencies or departments is named as a defendant is proscribed by the Eleventh

> Amendment." 104 S.Ct. at 908.

However, the Pennhurst opinion continues:

> "The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the state. This was the holding in Ex Parte Young 209 U.S. 123 (1908). . . . The theory of the case was that an unconstitutional enactment is 'void' and therefore does not 'impart to [the officer] any immunity from responsibility to the supreme authority of the United States.' Id. at 160. Since the State could not authorize the action, the officer was 'stripped of his official or representative character and [was] subjected to the consequences of his official conduct.' Ibid." 104 S.Ct. at 909.

Plaintiff's grievance against the California Supreme Court is explicitly directed against unconstitutional political collusion by members of the court to advance the interests of the Democratic candidates. See 1 Record 229-231.' (13 Record 562-564.)

'The Fourteenth Amendment does not say, "No state LEGIS-

LATURE shall . . . deny to any person within its jurisdiction the equal protection of the laws," nor does it allow any greater deference to state courts than to any other agency of state government. In Cooper v. Aaron (1958) 358 U.S. 1, 16-17 the U.S. Supreme Court ruled:

> "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'state' shall deny to any person within its jurisdiction the equal protection of the laws. 'A state acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no action of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.' [Citations.]"'

(13 Record 564-565.)

'Counsel for the California Supreme Court argues that the First Amendment provides no protection for political rights defined by state law against infringement by a state supreme court. However, Williams v. Rhodes (1968) 393 U.

S. 23, 30-31 notes that First Amendment protection of political rights operates through the Due Process Clause of the Fourteenth Amendment to protect these rights "from infringement by the states" and affirms that "other rights, even the most basic, are illusory if the right to vote is undermined." Duncan v. Poythress 515 F. Supp. 327, affirmed 657 F.2d 691, certiorari dismissed as improvidently granted 103 S.Ct. 368 (1983), provides a clear example of federal protection of political rights under a state constitution against collusion between a state's governor and supreme Court to subvert these rights.

'The Secretary of State's opposition to joinder of the California Supreme Court notes that interpretations of state and federal law are intertwined in Assembly v. Deukmejian [30 Cal.3d 638] but does not dispute Plaintiff's contentions that all of the interpretations of state law are consistent with Plaintiff's claims and that the state constitutional rights for which Plaintiff seeks federal protection were set aside by the California Supreme Court on federal grounds.' (13 Record 570.)

"In seeking to justify the abrogation of referendum stay provisions the majority opinion in Assembly v. Deukmejian (1982) 30

Cal.3d 638 argued:

> 'When the delay caused by such state constitutional prescriptions conflicts with a citizen's federal constitutional right to case an equally weighted vote, a court has the power to set aside the state constitutional provision.' Id. at 659.

"The Court decided to do so because 'circumstances require the immediate effectuation of the federal constitutional right.' Id.

> 'Moreover, the authority of a state supreme court to define state rights which are subject to federal protection is not absolute, as the Michigan Supreme Court has recently noted:
>
> > "In the instant case, this court has determined that there is a state goal. It has the authority to make that determination, although a Fourteenth Amendment claim is involved, absent evidence that the court's determination is disingenuous." In re Apportionment of State Legislature (1982) Michigan, 321 N.W. 2d 565, 598. Emphasis added.'
>
> (13 Record 570-571.)
>
> 'Where allegations of grave abuse of power are involved, accountability is as important in the judicial as in the executive branch. The following observation, made in reaction to President Nixon's

abuse of power, is relevant in the context of accountability of the California Supreme Court:

> "If there be no accountability the next president may feel free to do as he chooses, and next time there may be no watchman in the night." Representative James Mann, Watergate Impeachment Hearing, July 29, 1974.'

(13 Record 571-572.)

[c.] Evasion of Joinder Issue by District Court

"Plaintiff certainly admits that his May 17, 1982 joinder of the California Supreme Court was procedurally defective because he dis not secure the approval of the District Court for this joinder. However, when the Court ruled on March 27, 1984 that the May 17, 1982 joinder was invalid it did not identify any prejudice to the Court nor any other party arising from this procedural defect. Since the California Court had been and continues to be kept fully abreast by being served with all filings in this case, the joinder question should be decided on its intrinsic merits rather than on formal procedural grounds.

"Plaintiff moved to secure court approval for joinder immediately after the order of March 27, 1984 ruled that the California Supreme Court was not a party to Halliwell v. Eu, but the full court

referred Plaintiff's joinder motion to Judge Karlton. Judge Karlton took Plaintiff's motion under advisement after oral argument on August 27, 1984 and waited until April 4, 1985 before issuing a ruling that ignored the issues raised in briefing and provided only the following perfunctory explanation of the Court's decision:

> 'Good cause appearing therefor, the Court denies the motion to join the [California] Supreme Court. No claim is or can be stated against the Supreme Court with respect to the issues in this case.' (14 Record 3.)

"The full three-judge panel has refused to take cognizance of Plaintiff's efforts to refer the joinder question to it pursuant to 28 U.S.C. § 2284(b)(3). But joinder of the California Supreme Court obviously is the sort of 'sensitive and politically emotional' issue which Swift & Co. v. Wickham (1966) 382 U.S. 111, 119 notes is the raison d'être for three-judge district courts. Plaintiff's petition for mandamus (at 16 Record 10-11) seeks only enforcement of Swift v. Wickham so that Judge Karlton's 'individual predilection' to avoid the issues raised by joinder of the California Supreme Court will be reviewed by the full three-judge panel." (16 Record 395-402.)

3. Plaintiff's Motions to Compel Discovery

a. Discovery Disputes with Assembly

The basic method used to defend the contested assembly districts has been to refuse to provide information under the sole control of the Assembly which is essential to a determination of the constitutionality of the characteristics and mode of enactment of these districts.

A chronological account of Plaintiff's discovery dispute with the Assembly is unavoidably tedious, confusing and repetitious because the Assembly tried at every turn to obscure what the underlying factual issues were and repeatedly pretended not to understand what information Plaintiff was seeking.

Section (i) of this account discusses Plaintiff's efforts to secure three documents which were essential to development of an overall structure for

his challenge to the contested assembly districts. The first of these was a clear legal description of the districts being used to conduct the 1982 assembly elections and census population data for the components of each district. The second document was a transcript of a legislative hearing on the assembly redistricting plan. The third document consisted of materials which purported to demonstrate the compliance of the assembly plans with constitutional requirements; these were lodged with the District Court, but the Assembly refused to also supply them to Plaintiff.

Section (ii) of this account discusses the tactics which the Assembly employed to secure a summary judgment against Plaintiff without divulging the essential information under its sole control needed by Plaintiff for documentation of his assembly claims. The lynch-

pin of the Assembly's procedural strategy was to file its motion for summary judgment in such a way as to escape oral argument on it. Having avoided a hearing on its motion, the Assembly then used its rebuttal to misrepresent both the facts and its withholding of essential data so Plaintiff could not file a written response to these misrepresentations.

Section (iii) of this account summarizes the factual aspects of arguments filed in support of and in opposition to the Assembly's motion for summary judgment. This section first notes Plaintiff's grounds for opposition, then the Assembly's response to these points in rebuttal, then Plaintiff's subsequent attempts to correct the misrepresentations made in the Assembly's rebuttal and to secure essential information still being withheld by the Assembly.

Section (iv) of this account points out the misrepresentation and concealment of fundamental facts which were exposed as a result of the Assembly's finally supplying Plaintiff with the long-withheld documents. This section also discusses Plaintiff's subsequent inquiries to the Assembly by which Plaintiff attempted to secure information which would rectify the misrepresentation and concealment.

Section (v) of this account sets forth the Assembly's objections to Plaintiff's Inquiries and Plaintiff's responses to these Objections. This section also discusses the discovery hearings scheduled to resolve these disputes and the tactics used to avoid a ruling on the merits of Plaintiff's attempted discovery.

i. Plaintiff's Initial Requests for Documents

From the outset of this litigation Plaintiff has protested the obscure form in which the assembly plan was defined. In his February 19, 1982 opening complaint Plaintiff observes, "The assembly districts in A.B. 300 contain so many drafting errors that meaningful analysis of population equality and contiguity is very difficult." (1 Record 13.)

In his March 11, 1982 brief documenting his claims Plaintiff gives an example of the sort of problem which obstructed his analysis of the assembly plan:

> "There is one district in A.B. 300 that is a complete mess. The 22 AD must have been thrown together just as the redistricting bill was being printed, and some of the partial tracts don't even list blocks in numerical order. This district represents a bold new advance in reapportionment thinking: pass a thumbnail sketch of a district, then fill in the details after the leg-

> islature has voted. There are 42 changes for this one district in the Secretary of State's corrections list." (1 Record 192.)

In his June 14, 1982 protest concerning the Assembly's continuing refusal to provide essential data on the assembly plan Plaintiff quotes Exhibit C-1 of his supporting documentation:

> "A detailed analysis of population equality in . . . assembly districts is not possible with the data provided by the proponents of . . . A. B. 300. Without a listing of 'intended' populations in divided tracts, there is no way to separate intentional population disparities from drafting errors." (4 Record 8-9.)

Plaintiff then observes:

> "Mr. Remcho admits that additional errors beyond the 277 listed in his January 8, 1982 brief have since been found. These errors will certainly affect the accuracy of the population figures claimed in Mr. Remcho's briefs . . . .
>
> "It . . . would be impossible to determine where the Assembly's population figures don't coincide with those compiled by the Rose Institute and thereby independently determine which set of figures is correct, because the Assembly has never provided a population listing

by census units such as was filed with the California Supreme Court for the Legislature's congressional districts." (4 Record 10.)

Plaintiff continues:

"Whether Mr. Remcho is unaware of the number and magnitude of the city splits provided for his revised version of A.B. 300 is unclear. However, the very misleading nature of the comments on city splits in his brief certainly undermines the credibility of the unverifiable district populations which are also included in that brief of February 25." (4 Record 12-13.)

Plaintiff concludes:

"Without . . . a population breakdown for the original or revised version of the districts in that bill, or even a legal document defining the components of the assembly districts therein it is impossible to provide the particularized allegations and supporting documentation concerning assembly districts that are needed by the plaintiff in this action." (14 Record 13.)

On July 12, 1982 Plaintiff's amended complaint (at 4 Record 70) criticizes the Assembly's continuing refusal to rectify any of "the problems of imprecision and deliberate obscurity with

regard to the Assembly" which Plaintiff had pointed out in previous filings. Plaintiff argues: "Total stonewalling cannot be an adequate substitute for demonstration of compliance with federal or state one-person-one-vote requirements."

On November 29, 1982 Plaintiff protests the Assembly's continued withholding of essential factual information. Plaintiff argues:

> "Because of the unresolved complications produced by the huge number of 'technical corrections' to the assembly districts, verifying the population claims of the proponents of these districts is an impossible task without a specific listing of all the census population units in each district (as has been provided by Irell & Manella for congressional districts). Plaintiff has pointed to discrepancies between assembly-district populations calculated by the Rose Institute and the official figures released by the Assembly; these contradictions cannot be resolved without population subtotals which the Assembly refuses to provide." (6 Record 21-22.)

The process of enactment of a re-

districting plan is an important consideration in determining the constitutionality of the resulting districts, so Plaintiff's efforts to secure a transcript of the September 8, 1981 hearing on the assembly plan commenced almost immediately after the hearing took place. Although hearing transcripts are usually available from legislative committees within weeks of the hearing, the Assembly Reapportionment Committee declined to release the September 8 hearing transcript for nearly six months in spite of repeated requests for it. On March 11, 1982 Plaintiff sent a copy of his transcript request to Assembly counsel, but this produced no results, either. (See 1 Record 245-247, 273.)

On June 14, 1982 Plaintiff filed this protest concerning the Assembly's refusal to provide a transcript of the hearing on the Assembly redistricting

plan:

> "A great deal of light might be cast on the legislative intent behind A.B. 300 if the Assembly would transcribe the tapes of the September 8, 1981 hearing on this bill. Numerous precedents (see subsections 6.1a and 6.1b and Exhibit C-3 in inclusive complaint) establish the importance of statements made by legislators at public hearings in making appropriate interpretations of ambiguous legislative language. After having tried informally for many months to secure a transcript of the September 8 hearing I formally requested this information (see section 9.1 of the inclusive brief). Three additional months have passed since this request was mailed to Mr. Remcho on March 11, 1982." (4 Record 13.)

In Plaintiff's status report of November 29, 1982 Plaintiff complains:

> "It is utterly ridiculous that more than one year after the September 8, 1981 hearing on the Assembly's redistricting plans the transcript of this hearing has not yet been transcribed. After this stonewalling had continued for six months Plaintiff sought the assistance of the Court in securing this transcript, but the Court simply ignored this request." (6 Record 21.)

At the June 11, 1982 hearing Assembly counsel lodged certain "additional

briefing" with the Court "to further demonstrate the extent to which all issues were considered by the California Supreme Court." At the hearing Assembly counsel claimed that the citations in these briefs from the California Supreme Court case supported his position "with respect to the difficulty of interrupting an election once the process has gone on." See hearing transcript at 52.

Although the Assembly claimed at page 5 footnote 2 of its memorandum of May 21, 1982 (3 Record 234) to have provided these same materials to Plaintiff, it did not in fact do so. On the first working day after the June 11 hearing Plaintiff called Judge Karlton's law clerk concerning the discrepancy between the materials discussed at the hearing and those actually provided to Plaintiff and was told that he had a right to insist that the Assembly provide him with

the "true copy" of its filing which the Assembly's proof of service affirmed it had already provided. (See Plaintiff's affidavit at 4 Record 310.) Plaintiff then wrote to Assembly counsel to request that he live up to his employee's proof of service (see 3 Record 250). However, Assembly counsel refused to supply the materials in question until "the Judge rules on the jurisdictional motion."

The Assembly continued to withhold the materials provided to Judge Karlton alone even after Judge Karlton ruled on July 1, 1982 on motions submitted by the Assembly and the Senate. (Judge Karlton ruled (at 4 Record 57): "The motions to dismiss the complaint for failure to state a claim upon which relief may be granted, and for lack of subject matter jurisdiction are denied.") On August 23, 1982 (at 4 Record 310) Plaintiff

affirmed that the Assembly still had not provided the "Karlton-only" materials which its proof of service claimed to have provided to Plaintiff three months earlier.

On January 25, 1983 Plaintiff (at 7 Record 271-274) noted the Assembly's continuing refusal to honor its proof of service and provide Plaintiff with a copy of its "Karlton-only" filing; its refusal to provide a key transcript of a hearing on the assembly redistricting plan or even legal descriptions of the Assembly districts themselves; and its refusal to provide "population listings for specific census units in each of the contested assembly districts." Plaintiff also noted that the Assembly had responded to his efforts to secure withheld information with a threat of financial reprisal claiming that "Mr. Halliwell's vexatious conduct in this case imposes burdens

that no defendant can be reasonably expected to bear." (7 Record 15.)

Plaintiff reviewed the history of the Assembly aspect of the case and responded:

> "It is apparent from the preceding review that Plaintiff's manner of conducting his case has imposed no significant burdens on counsel for the Assembly. It is therefore clear that the threat of financial sanctions against Plaintiff is an effort to intimidate Plaintiff and discourage him from defending his own constitutional rights and those of other Californians similarly situated.
>
> "As is the case in every conspiracy to obstruct justice, only the main outlines can be guessed at until the alleged conspirators are required to produce evidence which they are withholding." (7 Record 273-274.)

ii. Assembly's Procedural Maneuvers to Evade Coming to Grips with Fundamental Factual Issues

The Assembly's main response to Plaintiff's complaints about its withholding of essential information on its

redistricting plan and its process of enactment was a series of procedural maneuvers which effectively prevented Plaintiff from countering factual misrepresentations by the Assembly. Plaintiff summarized these maneuvers at 16 Record 463-468.

> "This series of maneuvers commenced with an out-of-season motion by Assembly. Counsel for the Assembly clearly realized that the Assembly's motion for summary judgment should be filed so that the three-judge panel could hold one hearing on all aspects of the case, for at the December 6, 1982 status conference the following colloquy occurred:
>
> > 'MS. BRENNER [Assembly counsel]: With respect to the Assembly's motion to dismiss, we have indicated our intention to file a motion for summary judgment, which is essentially a failure to state a claim. Would the Court have any objection to combining that with the motion to dismiss?
> >
> > 'THE COURT: I would be thrilled. If we could get all the motions together, so we could gather them up, take a day on the three judges' calendar, have them all heard, then hopefully we could dispose of them and find out

> whether we have a live lawsuit. And if we do, get it on the calendar and get it moving; and if we don't so be it.' Hearing transcript at 27-28.

"The briefing schedule for the omnibus hearing decided upon at the December 6 status conference is set forth in Judge Karlton's December 16, 1982 order following status conference:

> 'All [anticipated motions] shall be submitted according to the following schedule, and only according to that schedule: the motions shall be filed and served with supporting memoranda not later than January 7, 1983.' 6 Record 275-276.

The order of February 8, 1983 held that no new motions would be heard which did not conform to this schedule.

> 'At the status conference conducted by the Honorable Lawrence K. Karlton on December 6, 1982, a schedule for the hearing of all motions was discussed and ordered. This schedule prevails over Local Rule 113.' 17 Record 526.

"Nevertheless the Assembly filed a motion for summary judgment after the February 16, 1983 omnibus hearing and was thereby able to avoid oral argument on its motion. The absence of oral argument was of pivotal importance because the Assembly moved for summary judgment on the basis of population claims which Plaintiff could not challenge since the Assembly was the sole source for population data on its

own districts and refused to divulge the data used to compile its population figures.

"The Assembly's maneuvers to avoid oral argument seem to have been inspired by Plaintiff's use of previous hearings to press the Assembly to disclose information which it was withholding. At the December 6, 1982 status conference Plaintiff protested the Assembly's withholding the transcript of the September 8, 1981 hearing on the Assembly plan, census data for their districts, and information on 277 unauthorized modifications to Assembly districts:

> 'MR. HALLIWELL: All right. I want to hear directly from the Assembly counsel whether or not they're going to supply that hearing transcript, their population breakdown, and the justification for the 277 corrections, or whether I have to get a subpoena for that?
>
> 'THE COURT: Do you know what he is talking about?
>
> 'MS. BRENNER: I have a rough idea, Your Honor. I believe what he is talking about are matters that are in large part absolutely irrelevant to this case.' Hearing transcript at 17.

"Plaintiff continued his efforts to obtain the information being withheld by the Assembly after the December 6, 1982 hearing, as Plaintiff needed this information in connection with arguments on his motion to invalidate the 1982 assembly elections which was slated

for consideration by the Court on February 16, 1983. But the Assembly did not file its opposition to Plaintiff's motion regarding the Assemblymen elected in 1982 as required by the Court's order (see 10 Record 10-11), so oral argument on Plaintiff's challenge to the Assembly districts was not heard at the February 16, 1983 hearing. Instead the Assembly obtained postponement of the Court's consideration of Plaintiff's motion.

"Although consideration of the assembly plan was postponed to a later day, Plaintiff argued at the February 16, 1983 hearing that this was no justification for the Assembly's continuing refusal to divulge vital information. At that hearing Plaintiff again complained:

> 'Can you believe it? A year after the case was filed, in spite of the obvious relationship to Watergate, I'm still being stonewalled in an effort to get a transcript of a hearing, a public hearing. They have simply contrived not to write up those notes. This is an important part of my argument of bad faith. They have not given any verifiable population figures. They simply assume they're in the record. It takes more man hours than I expect to live to be able to go unit by unit and reconstruct that thing from the bill myself.
>
> 'In the argument that they made in defense of Proposition 12, that was the assembly re-

> apportionment referendum, they talked about how expensive it would be on the reapportionment had this one been rejected as it was. The sheer magnitude of the figure that they allege for new reapportionment demonstrates, [one] hopes [to] this court, how impossible it is for me to just work from the bill and present a persuasive case of the violation to the one-man-one-vote [principle] in the absence of the essential ingredient of population as set forth in the district, particularly the split tract. I can look up the whole tract like anyone else. But the split tracts are the problem in this bill. Well the Assembly has not defended its plan, much less the congressional plan.' February 16, 1983 Hearing Transcript at 47.

"The order of April 19, 1983 established a new briefing schedule for Plaintiff's motion seeking to invalidate the 1982 assembly elections. This order also called for briefing on the Assembly's out-of-season summary judgment motion on the same schedule. The order of April 19, 1983 implied that oral argument might still be held on these motions: the order states, 'Upon receipt of all briefs, the Court will determine whether oral argument is appropriate . . . .' (8 Record 127.) From this Plaintiff assumed that argument would be considered inappropriate only if the Assembly failed to make a case for

> its motion; he did not imagine that any court would decide a challenge to a statewide apportionment plan without a hearing, especially in view of the explicit hearing requirement of 28 U.S.C. § 2284 and the Assembly's continued withholding of essential population data."

iii. Factual Issues Raised in Briefing on the Assembly's Motion for Summary Judgment

In his opposition to the Assembly's summary judgment motion Plaintiff protested (at 8 Record 172-177) the tactics used by the Assembly to conceal the true characteristics of their redistricting plan.

Plaintiff also recounted how it became clear, when proponents of the congressional plan supplied the sort of census data Plaintiff was seeking for the assemply plan, that affidavits by architects of the congressional plan had understated the maximum population disparity by a factor of twenty. Plaintiff

then argued that

> "While the Assembly may well believe that the population figures provided by James Tucker are accurate, they obviously are reluctant to put this belief to the test and thus risk the sort of refutation of their population claims that befell the proponents of the Legislature's congressional redistricting plan." (8 Record 172-173.)

Plaintiff then demonstrated that the Assembly had calculated crucial population statistics in a deliberately misleading manner so that the median population disparity comes out five times too small, the relative disparity between largest and smallest districts is understated by a factor of eight, and the mean deviation from the ideal population is twenty times larger than claimed by the Assembly. Plaintiff contends on the basis of these distorted population statistics and previously documented (at 4 Record 11-13) systematic misreporting by the Assembly of city fragmentation in

its plan that

> "In every aspect of its data analysis the Assembly has sought to create a misleading impression by citing isolated facts out of context. When the facts taken out of context are also accidentally misreported [see 8 Record 173], the Assembly slips across the line between evasive statements and outright falsehoods. When population disparities for the contested assembly districts can be verified Plaintiff has no way of knowing whether they will turn out five, eight, or twenty times as large as claimed; but in view of the magnitude of the Assembly's previous statistical errors Plaintiff surely is justified in insisting upon documented proof of the Assembly's population claims." (8 Record 174.)

With respect to withheld documents relating to the contested assembly districts and their process of enactment Plaintiff also complained,

> "Plaintiff formally requested a transcript of the September 8, 1981 hearing on A.B. 300 more than a year ago (1 Record 245-247). In addition to ignoring Plaintiff's requests for this transcript the Assembly has also refused to provide other documents Plaintiff needs. It has been nearly a year since Plaintiff requested a verifiable compilation of assembly district popu-

lations (4 Record 4-13) and a copy of documents filed by the Assembly with this court (4 Record 310). If any of these requests lacks some essential information Plaintiff has never been informed of what the Assembly needs to know in order to respond properly." (8 Record 175.)

Plaintiff then concludes his opposition to the Assembly's motion for summary judgment as follows:

"While Mr. Remcho may not be able to persuade his clients to provide a transcript of the September 8, 1981 hearing on the districts set forth in A.B. 3[illegible] or any documentation for the populations claimed for these districts, he is personally responsible for the failure to provide the third essential item of evidence, the materials filed by the Assembly with the California Supreme Court in Assembly v. Deukmejian. On June 14, 1982 Plaintiff protested the failure of the Assembly to provide Plaintiff with a complete copy of materials filed with this court. The Assembly first refused to provide the materials until after Judge Karlton ruled on the motion to which the materials had been appended as supporting evidence. Judge Karlton ruled on this motion on June 30, 1982, and now, nearly one year after Plaintiff sought by phone, letter and sworn affidavit (4 Record 310) to secure a copy of these materials, they still are being withheld. Since

> these materials were lodged with this court and since an employee of Rosen and Remcho affirmed under penalty of perjury that they had been supplied to Plaintiff, the continuing refusal of Mr. Remcho to provide them is indefensible." (8 Record 176-177.)

In its rebuttal in support of summary judgment the Assembly claims (at 8 Record 309), regarding the materials supplied to Judge Karlton but not Plaintiff, to be "at a loss to understand exactly to what 'materials' Mr. Halliwell refers." The Assembly pretends that it has already provided the district population subtotals sought by Plaintiff, claiming,

> "Plaintiff now has in his possession all information concerning the actual population used in California's 1982 assembly elections . . . . Mr. Halliwell's rantings to the contrary cannot and do not establish that information has been withheld from him." (8 Record 309.)

However, the Assembly does supply the September 8, 1981 A.B. 300 hearing transcript which Plaintiff had been seeking for more than a year, claiming (at 8

Record 309), "Counsel for the Assembly learned for the first time on May 17, 1983 that such a transcript now exists."

When eight months had passed after briefing was completed on the Assembly's summary judgment motion without any ruling by the Court, Plaintiff filed a memorandum in support of expedited consideration which discusses (at 11 Record 534-539) the withholding and misreporting of essential data by the Assembly.

Plaintiff noted that the understated median population disparity, relative disparity between largest and smallest districts, and mean deviation from the ideal population were all within constitutionally allowable limits, but the true values (in the context of California's populous assembly districts) were all more than twice as large as needed to establish prima facie violations of the Equal Protection Clause under the stand-

ards set forth in White v. Regester (1973) 412 U.S. 755 and Gaffney v. Cummings (1973) 412 U.S. 735. After documenting these facts Plaintiff observed,

> "It is worth noting that in [the Assembly's brief] (at 8 Record 9), where the erroneous mean deviation, median deviation and largest-to-smallest ratio are set forth, Plaintiff's skepticism about the validity of the Assembly's population claims is ridiculed as being based on 'not one shred of evidence.' If anything at all was learned from the discrepancy between the transcripts of the tape recordings provided under sworn affidavit and the actual recorded conversations among the conspirators in the Watergate episode, it is that in a conspiracy case no court should trust indirect evidence when those charged with complicity in the conspiracy have direct evidence which they refuse to provide." (11 Record 536.)

Plaintiff then discussed the hearing transcript which Assembly counsel claimed to have learned of "for the first time on May 17, 1983":

> "Population data are not the only items of vital information that have been withheld from Plaintiff in this case. The transcript of the September 8, 1981 hearing on A.B.

> 300 was suppressed for nearly two years before it was finally supplied to Plaintiff along with the Assembly's brief of May 23, 1983. . . . In his brief of May 9, 1983 Plaintiff notes (at 8 Record 175) the numerous attempts (commencing on March 11, 1982) that Plaintiff made to secure this transcript from Mr. Remcho (see proof of service at 1 Record 273). If Mr. Remcho did not get around to inquiring about it before May 17, 1983 it must be only because he wanted to preserve deniability." (11 Record 536-537.)

Plaintiff next discussed the Assembly's alleged inability to understand what materials it had supplied to Judge Karlton but not to Plaintiff. Plaintiff quoted (at 11 Record 538) from his letter of June 22, 1982 to Assembly counsel which identifies the withheld materials as those "described in footnote 2 of your Memorandum of Points and Authorities" and stated, "Since you provided these briefs to the Court and referred to specifics therein at the June 11, 1982 hearing it is only fair that I receive a copy so that I might make an appropriate

response." Plaintiff also quoted (at 11 Record 538-539) the June 30, 1982 answering letter from Assembly counsel, which stated, "The material described in our Memorandum of Points and Authorities is nothing other than our original [California Supreme Court] Petition and Memorandum and our response to the Court's 18 questions." (This was the same letter which promised, "We will be happy to provide it once the Judge rules on the jurisdictional motion.")

"On March 13, 1984 Plaintiff renewed his protest at the protracted inaction of the District Court and (at 12 Record 112-120) quoted excerpts from the Case Record which were the milestones of his two-year-long battle to secure essential data from the Legislature on its redistricting plans. Plaintiff also quoted the Assembly's first brief which clearly identified the "Karlton-only" materials

which the Assembly still refused to provide to Plaintiff:

> "At 3 Record 234 the Assembly noted:
>
> > 'The Assembly has lodged herewith copies of its Petition for Writ of Mandamus, Memorandum in Support of Petition for Mandamus and its additional Briefing, all filed in the California Supreme Court. They are submitted here to further demonstrate the extent to which all issues were considered by the California Supreme Court and to provide additional supplemental citations without unduly lengthening this Memorandum.'" (12 Record 119.)

In spite of Plaintiff's strenuous protests concerning essential data being withheld by the Assembly, the Court granted the Assembly's summary judgment motion without a hearing. The order of March 27, 1984 does not explain why the hearing requirement of 28 U.S.C. § 2284 is brushed aside, saying only that "the Court now determines that oral argument is unnecessary." (12 Record 235.) Likewise the order ignores the evidentiary

significance of the Assembly's withholding of vital data, saying only, "The Plaintiff vigorously disputes the figures proffered by the Assembly, but not in any legally cognizable way." (12 Record 248.)

In his response to the order of March 27, 1984 Plaintiff complains that the Court ruled without even requiring that the Assembly's "Karlton-only" materials also be provided to Plaintiff:

> "In his January 15, 1984 protest concerning the conduct of these proceedings Plaintiff notes:
>
> > 'Judge Karlton's law clerk agreed to send Plaintiff a copy of the missing materials if Mr. Remcho refused to do so. However, by the time it became apparent that Mr. Remcho would not provide the missing documents Judge Karlton had enjoined Plaintiff from communicating with any member of his staff.' 11 Record 539.
>
> Instead of providing Plaintiff with a copy of the June 11, 1982 materials as promised or requiring the Assembly to do so, the Court has granted the Assembly a summary judgment on the very issue to which the withheld materials are most rele-

vant." (12 Record 347.)

> "It was indefensible for the Assembly to withhold the footnote 2 materials [from Plaintiff] until after the Judge ruled on the motion in support of which these materials had been introduced. The Assembly's continued refusal to provide these materials along with its other professional misconduct constitute a breach of the proper interest of the government in any legal proceeding as identified in Campbell v. United States [(1961) 365 U.S. 85, 96]: 'not that it shall win a case, but that justice shall be done . . . .' Berger v. United States, 295 U.S. 78, 88.'" (12 Record 350.)

After this protest the Court finally required the Assembly to live up to its proof of service and provide the long-withheld portion of its May 25, 1982 brief to Plaintiff. The Assembly's June 5, 1984 letter of transmittal states:

> "Enclosed please find copies of the documents referred to at page 5, footnote 2, of our Memorandum of Points and Authorities in Support of Motion to Dismiss, filed with the Court on May 25, 1982. These are the documents filed in the California Supreme Court in Assembly v. Deukmejian that you discussed with me by telephone on May 22,

1984." (13 Record 141.)

The Assembly's transmittal letter goes on to suggest that Plaintiff had already received these materials as an intervenor in Assembly v. Deukmejian. Actually Plaintiff was only an amicus curiae whose participation was limited to the congressional aspects of the case.

The letter also suggests that Plaintiff should have submitted a discovery request to secure materials filed with the Court in Halliwell v. Eu.

Then the letter continues,

> "As agreed in our May 22 conversation, our submission to you of the enclosed documents does not constitute a waiver on our part with respect to any motion you may choose to file based on their contents. We will oppose any and all efforts by you to reopen the issues concerning the Assembly of the State of California already finally determined by the District Court." (13 Record 141.)

In support of his motion for reconsideration of the Assembly's summary

judgment Plaintiff discusses (at 13 Record 156-160) "Essential Materials Long Withheld by the Assembly."

Plaintiff argues:

> "The absence of any legislative intent to authorize post-enactment modifications to A.B. 300 and the relative reliability of statistical claims made by proponents and by minority-party analysts of the 1981 assembly plan are both documented in the transcript of the September 8, 1981 hearing on A.B. 300, but the Assembly suppressed this transcript for nearly two years, until it was too late for Plaintiff to cite it in opposition to the Assembly's summary judgment. Plaintiff formally requested a transcript of the September 8, 1981 hearing on A.B. 300 on March 11, 1982 (1 Record 245-247), after nearly six months of unsuccessfully trying to secure this transcript from the Assembly Elections and Reapportionment Committee. This request was renewed on June 14, 1982 (4 Record 13). Plaintiff continued his efforts to secure this transcript from the Assembly for almost another year without success (see 8 Record 175) until, pursuant to Plaintiff's request of May 8, 1983, it was at last supplied. At that time the Assembly alleged: 'Counsel for the Assembly learned for the first time on May 17, 1983 that such a transcript now exists.' 8 Record 309.
>
> "Other crucial materials, which

> were provided to this court to 'demonstrate the extent to which all the issues were considered by the California Supreme Court' and that the Assembly's plan 'was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate,' were withheld from Plaintiff for more than two years. On June 14, 1982 Plaintiff had protested to the Court the failure of the Assembly to provide a copy of these materials lodged with the Court at the June 11, 1982 hearing." (13 Record 156-157.)

Plaintiff continues to recount the five unsuccessful requests made for these materials over the next two years and then notes: "On June 5, 1984 the Assembly finally provided Plaintiff with a copy of materials which according to its proof of service it had provided on May 25, 1982." (13 Record 158.)

iv. Plaintiff's Inquiries Arising from the Long-Withheld Documents

After discussing the excuses offered by the Assembly for refusing to honor its proof of service Plaintiff discusses

the impact of this refusal upon the case:

> "Because of the great claims regarding these materials which the Assembly made in filing them with this court, Plaintiff was reluctant to proceed without them; therefore the withholding of these documents created an impediment for two years in Plaintiff's prosecuting his claim regarding population disparities in the 1982 assembly districts.
>
> "Moreover, one portion of the materials in question clearly places in a different light the line of argument used to support the Assembly's motion for summary judgment. In its rebuttal to Plaintiff's opposition to its motion for summary judgment the Assembly alleged (at 8 Record 306) that in Legislature v. Reinecke IV (1973) 10 Cal.3d 396 the Court did not adopt the reasoning of its Special Masters with respect to the population equality standards for legislative districts and argued (at 8 Record 307) that Chapman v. Meier (1975) 420 U.S. 1 did not require a more stringent standard of review for the plan at issue here because it was adopted by the California Supreme Court rather than by the Legislature. But in arguing in behalf of its 1981 redistricting plan in the long-suppressed brief (at 44) submitted to the California Supreme Court the Assembly takes the opposite positions: it refers to 'the standards for population equality adopted by the Special Masters in 1973 and ENDORSED BY THIS COURT in Legislature v. Reinecke IV (emphasis added)

and goes on (at 44-45) to cite federal caselaw which requires strict population equality in court-ordered state legislative plans:

> '"A court-ordered plan, however, must be held to higher standards [of population equality] than a state's own plan." Chapman v. Meier, 420 U.S. 1, 26 (1975). ". . . [A] state legislature is . . . by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." Connor v. Finch, 431 U.S. 407, 414-415 (1977). A court of equity, by contrast,
>
> > "possess[es] no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name [and] lack[s] the political authoritativeness that the legislature can bring to the task." Id. at 415.'
>
> Bracketed material in Assembly's brief.

In short, the California Supreme Court was urged by the Assembly to act in the same manner as if it were a court of equity, but this court has been urged by the Assembly to exempt a state-court-mandated plan from the population equality standards generally applicable to court-ordered plans." (13 Record 158-160.)

Once the Assembly provided its "Karlton-only" materials Plaintiff found

that there were numerous factual distortions and inconsistencies in the Assembly's case. Plaintiff therefore undertook formal discovery proceedings to clarify these matters. (See 13 Record 292-308.)

Inquiry A involves "38 enumerated revisions to the A.B. 300 assembly districts for which Plaintiff has maintained there is no legal authorization." Inquiry B seeks "a detailed population' breakdown for the assembly districts used to conduct the 1982 elections." Inquiry C1 notes that "California contains nearly 90,000 census blocks" and seeks an admission "that without the information on divided census tracts the Assembly has refused to provide, verification of the populations alleged for its districts by the Assembly is beyond the capabilities of any one individual." Inquiry C2 seeks an admission "that the discrep-

ancies between its own corrected version of the assembly plan and the text of the enacting legislation are more numerous, are more substantial, and involve more people than those which the Assembly alleged invalidated referendum petitions filed against A.B. 300." Inquiry C3 notes that in California Supreme Court proceedings the Assembly acknowledged "that a constitutional redistricting plan 'must not split cities or counties unnecessarily'" and seeks admissions regarding various factual misrepresentations "concerning the splitting of cities and counties in A.B. 300" made by the Assembly to the California Supreme Court. Inquiry C4 notes assurances made by the Assembly to the California Supreme Court "that A.B. 300 manifests the required sensitivity to minority voting rights" and seeks admissions regarding concessions to Anglo Democrat incumbents which

"limited black and Hispanic opportunities to elect the candidates of their choice to less than what is usually required in court-ordered redistricting plans." Inquiry C5 notes the Assembly's statement to the California Supreme Court that a court-ordered plan "that favored incumbents -- or anyone else . . . would be suspect indeed" and seeks an admission regarding systematic favoritism toward Democratic candidates in the Legislature's redistricting plans which it urged the California Supreme Court to adopt as its own court-ordered plans. Inquiry C6 cites Plaintiff's analysis of the alternative redistricting plans made available to the California Supreme Court and seeks an admission by the Assembly "that most of these plans involved less fragmentation of cities and counties, smaller population disparities, and fewer divided census tracts and resulting administra-

tive problems than the plans adopted by the Legislature." Inquiry C7 seeks admissions regarding various misrepresentations to the California Supreme Court made by the Assembly regarding the characteristics of Republican-sponsored redistricting plans submitted to the California High Court. Inquiry C8 seeks an admission "that there is no interpretation of state law in Assembly v. Deukmejian which impairs any of Plaintiff's claims against the constitutionality of the redistricting plans used to conduct California's 1982 elections" and that the California Supreme Court's rulings adverse to Plaintiff were based on federal grounds.

v. Assembly's Objections to Plaintiff's Inquiries and Plaintiff's Responses to These Objections

The Assembly responded to Plain-

tiff's inquiries by flatly refusing to provide any information at all, saying, "Defendant-Intervenor Assembly of the State of California hereby objects to each and all of 'Plaintiff's Inquiries to the Assembly.'" (13 Record 449.)

The grounds for the Assembly's blanket objection and Plaintiff's response to these grounds are discussed at 13 Record 592-598.

The Assembly's first justification for refusing to provide any of the information sought by Plaintiff is that this information should have been sought earlier by formal discovery (rather than by simply requesting the information, as Plaintiff had done repeatedly from the outset of the Assembly's participation in Halliwell v. Eu):

> "At [13 Record 451] of the Assembly's statement of objections the Assembly argues:
>
> 'The discovery request that is the subject of the

> objections is the first one served on the Assembly by Mr. Halliwell. It comes more than two years after his complaint was filed, over one year after his opposition to the Assembly's motion for summary judgment was filed, and three months after the Court's ruling rejecting Mr. Halliwell's claim against the Assembly. Plaintiff clearly had ample opportunity to seek the information he now requests by discovery prior to the Court's March 27, 1984 order awarding summary judgment to the Assembly.'

As in the past, the Assembly here attempts to create procedural smokescreen in order to avoid presenting a substantive defense.

"In fact most of Plaintiff's inquiries arise from a document lodged by the Assembly with this court and according to proof of service also provided to Plaintiff but actually withheld from him by the Assembly for two years in spite of Plaintiff's repeated requests that the Assembly honor its proof of service. Inquiry C1 cites pp. 37-38 of this document, Inquiry C3 cites p. 37, Inquiry C4 cites pp. 37-38, Inquiry C5 cites pp. 46-47, and Inquiry C7 cites p. 47. Obviously these inquiries could not have been made without the document in question.

"Nearly all of the remaining inquiries had been made previously without recourse to formal discovery procedures because Plaintiff expected that if the Assembly was not

> willing to supply the requested information voluntarily a protracted battle would be necessary to secure the information by formal means and the Assembly's goal of avoiding timely adjudication on the merits would be served by the added resulting delay. In view of the persistent misconduct by counsel for the Assembly which has led to the current situation Plaintiff certainly was not legally obliged to conduct several separate battles for the information he seeks, since the Assembly would only have used these for further delay. The impasse created by the Assembly continues, for the Assembly still totally refuses to divulge any information even though Plaintiff has employed the procedures which the Assembly has insisted are necessary to secure the population data which the Assembly continues to withhold." (13 Record 592-593.)

The Assembly's second justification for objecting to Plaintiff's inquiries invokes Judge Karlton's exclusion of aspects of Plaintiff's claims which touch upon many of Plaintiff's inquiries. The Assembly's objection ignores the fact that Judge Karlton made his ruling based on materials supplied only to the Court and the fact that the inquiries the

Assembly seeks to disallow all deal with misrepresentations made by the Assembly during Assembly v. Deukmejian which Plaintiff was able to unmask only after Judge Karlton ruled and the Assembly provided its "Karlton-only" materials to Plaintiff.

> "At [13 Record 452] of the Assembly's statement of objections the Assembly gives a second ground for refusing to supply the information requested by Plaintiff:
>
> > 'With the exception of "interrogatory Pursuant to Rule 33," the information requested by Plaintiff does not concern the actual populations of the 1982 Assembly districts. They are therefore not relevant to the sole pertinent issue identified by the Court, nor will they lead to the discovery of relevant materials.'
>
> In fact many of these inquiries do involve district populations. Inquiry C1 deals directly with the problem of verifying district populations. The order of March 27, 1984 (at 7) cites authorization of districts by 'the state's highest court' as a factor in determining the acceptable magnitude of population disparities, and Inquiries A and C2 deal with illegal departures from the plan actually authorized by the California Supreme Court.

"This court's order of November 1, 1982 notes (at 5) that 'the challenged plan was adopted for this election only by the California Supreme Court and that in doing so that court concluded that it was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate.' Inquiry C6 deals with population disparities in available alternative redistricting plans which might have been adopted by the California Supreme Court had the true magnitude of the population disparities in the Legislature's plans not been understated by their proponents. The population disparities in available alternative plans thus clearly are a relevant consideration. Inquiry C7 deals with the misrepresentations to the California Supreme Court by the Assembly regarding the characteristics of alternative redistricting plans, and Inquiries C3, C4 and C5 deal with misrepresentations of the characteristics of the Assembly's own plan. Even if this court should decide that the actual facts which were the subject of these misrepresentations are without federal constitutional significance the information sought by Plaintiff's inquiries is still admissible because it casts doubt on the credibility of other statistics provided by the Assembly." (13 Record 593-595.)

The Assembly's third justification for supplying no information in response

to Plaintiff's discovery request suggests that the Court's granting of the Assembly's surprise, out-of-season summary judgment motion made the whole issue of the contested assembly districts irrelevant to the litigation and therefore an inappropriate subject for discovery:

> "At [13 Record 452] of the Assembly's statement of objections the Assembly tries to demonstrate that the actual populations of the 1982 assembly districts are also irrelevant at this stage of proceedings.
>
> 'More importantly, none of the information requested -- including that sought by the "Interrogatory Pursuant to Rule 33" -- is relevant to the pending action because the sole issue identified by the Court as determinative of Plaintiff's action against the Assembly has already been resolved adversely to Mr. Halliwell. Order, March 27, 1984, 13:21-17:26. There is thus no longer any "subject matter involved in the pending action" nor, accordingly, any information relevant to subject matter involved in the action. Fed.R. Civ.P. 26(b)(1). While Plaintiff has moved for reconsideration of the Court's March 27, 1984 order awarding summary

> judgment to the Assembly, he has provided no grounds for setting aside that order. See Defendant-Intervenor Assembly's Opposition to Plaintiff's Motion to Vacate the March 27, 1984 Order of Summary Judgment, filed July 23, 1984. Absent such grounds, there is no basis for discovery following resolution of the summary judgment motion.'

In fact Plaintiff has responded to the major reason cited by the Court for its granting of summary judgment, i.e., that Plaintiff's challenge to the accuracy of population figures proffered by the Assembly was not presented in any legally cognizable way. Since Plaintiff has provided the necessary affidavits and has employed formal discovery procedures there is no longer even a procedural justificaion for the Assembly's continued refusal to substantiate its population claims. If a litigant were not allowed to secure clearly relevant factual information in support of a motion for reconsideration when the opposition is the only source of that information all interlocutory rulings would become final dispositions. On the contrary, Rule 54(b) clearly makes the summary judgment in favor of the Assembly 'subject to revision at any time.'" (13 Record 595-596.)

The Assembly's last justification for refusal to supply the information

sought by Plaintiff's inquiries is based on an outright lie: that the Assembly has already provided this information:

> "Finally, the Assembly claims that Plaintiff's inquiries are 'unduly burdensome and oppressive.' At [13 Record 452-453] of the Assembly's statement of objections the Assembly argues:
>
> > 'The Assembly has already provided to Plaintiff all of the information in its possession concerning the actual population of the 1982 Assembly districts. Declaration of Joseph Remcho in support of Defendant-Intervenor Assembly's Motion for Summary Judgment filed February 16, 1983. The "detailed population information" requested by Plaintiff in the "Interrogatory Pursuant to Rule 33" is already in his possession, and has been since long before the Court entered summary judgment on behalf of the Assembly. Requests for information already provided are clearly burdensome and oppressive. To the extent that Plaintiff's request is that the Assembly analyze data long in his possession, he seeks to place on the Assembly a burden that is clearly his: that of proving his own case. Such a request is beyond the scope of discovery under the Federal Rules of Civil Procedure.'
>
> This passage contains several out-

right misstatements of fact. The Assembly has supplied Plaintiff with several copies of the Tucker affidavit but none of the additional population data which he has repeatedly requested and requests once again in his Interrogatory Pursuant to Rule 33. The withheld information includes the populations for divided census tracts used to compute the district populations attested to by James Tucker, an explanation of any population estimates used in these computations, and the individual components of each of the 1982 assembly districts and the population of each component. The affidavit of Joseph Remcho claiming to have supplied this information is no more accurate than the proof of service which claimed to have provided Plaintiff a copy of materials lodged with the Court more than two years ago but not given to Plaintiff until June 5, 1984.

"The assertion that the Assembly has provided all of the information in its possession concerning the actual population of the 1982 assembly districts can be true only if the Assembly has tried to avoid Richard Nixon's mistake of preserving incriminating evidence by destroying the population data base which was compiled at a cost of several hundred thousand dollars and used to construct the 1982 assembly districts.

"Supplying the population data which the Assembly continues to withhold will be proving Plaintiff's case only if these data contradict

> Mr. Tucker's population claims. These data are essential for verifying assembly district populations, so if they support the Tucker figures the Assembly will be proving its own case." (13 Record 596-598.)

Plaintiff concludes his analysis of the Assembly's blanket objections to his inquiries:

> "Like the other defendants, the Assembly continues to supply only claims without any supporting data concerning its own redistricting plan. If the basic facts actually supported the Assemby's claims the Assembly would have provided this data long ago." (13 Record 598.)

The Assembly's opposition to Plaintiff's motion to compel discovery simply repeated the Assembly's original objections to Plaintiff's inquiries. Plaintiff's motion to compel discovery was referred by the District Court to a Magistrate who declined to rule on the merits of Plaintiff's right to discovery from the Senate and Assembly until the District Court ruled on Plaintiff's

motion for reconsideration of the order of March 27, 1984.

The Assembly was able to cloud the issue of Plaintiff's right to discovery by holding all of its supporting authorities in reserve and springing them at the Magistrate's discovery hearing. This forced Plaintiff to ask for a postponement so that he could address (at 14 Record 439-450) the applicability of the cases presented orally by the Assembly. These events are noted in the Foreword of Plaintiff's brief responding to the Assembly's surprise citations:

> "In his April 29, 1985 Preliminary Memorandum Regarding Discovery Disagreement (at 112) Plaintiff complained, '[N]one of the defendants has supplied any information in response to these inquiries nor cited a single case in support of their refusals to respond . . . .' Emphasis in original. The Assembly's May 9, 1985 opposition to Plaintiff's motion to compel discovery was as bereft of supporting authorities as its original objections to Plaintiff's inquiries.
>
> "However, at the May 23, 1985

hearing on Plaintiff's motion the Assembly surprised Plaintiff and the Court by citing In re 'Agent Orange' Product Liability Litigation (1983) 97 F.R.D. 542 and Tim W. Koerner & Assoc., Inc. v. Aspen Labs, Inc. (1980) 492 F.Supp. 284, neither of which had been included in Defendants' briefs. Since both of the cases had been available for years it would seem that they had been held in reserve for the hearing. Plaintiff protested this unfair tactic and was granted permission to file this brief addressing these cases." (14 Record 439.)

Plaintiff first addresses the Agent Orange citation:

> "The situation in the Agent Orange litigation bears no resemblance to that in Halliwell v. Eu. The Agent Orange opinion notes:
>
> > 'Nearly a year ago, on May 19, 1982, the Special Master directed the defendants to make specific document requests. However, defendants did not make a specific request until four weeks ago, March 15, 1983, at which time they requested production of 224 documents.' 97 F.R.D. at 543.
>
> Plaintiff's request for documents in Halliwell v. Eu has been limited to legal descriptions of the contested districts and the populations of census units divided between districts. These requests were made soon after the materials in question were cited in defendants' briefs.

"No discovery deadline has been established in Halliwell v. Eu. In Agent Orange the opinion notes:

> 'On April 4, 1983 the Special Master ordered the defendants to limit their request. When defendants limited their request to 119 documents, rather than the number (approximately two dozen) the Special Master had suggested, he denied their request for production on the ground that they had waited until the eleventh hour of discovery to request documents they could have requested many months ago.' Id."

(14 Record 440.)

Plaintiff's response to the Assembly's surprise citations continues:

"Unlike the situation in Koerner Plaintiff has not delayed unduly in seeking to compel discovery. In Koerner the opinion notes:

> 'Plaintiff, Tim Koerner and Associates, Inc.'s motion to compel production of documents was filed nine months after Defendant, Bristol-Myers' responses to Plaintiff's third request for production of documents and almost two months after Defendants' motion for summary judgment.' 492 F.Supp. at 297.

In Halliwell v. Eu Plaintiff's original request for documents from the Assembly was made on June 14, 1982 (4 Record 13), and on August 23, 1982 Plaintiff filed an affida-

> vit (4 Record 309-310) noting the Assembly's continued refusal to supply materials essential to Plaintiff's case in spite of a proof of service which claimed to have supplied most of these materials. On December 6, 1982 Plaintiff sought the assistance of the Court in compelling production of the withheld documents. The court refused this request, saying, 'I keep telling you I can't be your lawyer, Mr. Halliwell.' [See Hearing Transcript at 18-19, quoted at 14 Record 165-166.]" (14 Record 441.)

Pursuant to Defendants' request for additional preparation time, Magistrate Mix postponed her (previously continued) Discovery hearing to July 25, 1985 (see 15 Record 1-2). Meanwhile Plaintiff wrote individual letters to the members of the District Court (14 Record 420-437) urging the Court to clarify its order of March 27, 1984 with respect to Plaintiff's right to discovery from the Senate and Assembly. Then, pursuant to a provision (15 Record 2) in the Magistrate's order postponing her discovery hearing (which allowed motions to be

filed up to July 11, 1985), Plaintiff sought to expedite matters by requiring that the Senate and Assembly at least file specific objections to his inquiries while the Magistrate awaited clarification of Plaintiff's right to discovery by the District Court.

In the section (15 Record 12-17) of his supporting memorandum entitled, "The Order of March 27, 1984 Cannot Justify Refusal by the Assembly to Respond to Plaintiff's Inquiries Inasmuch as the Assembly Secured its Summary Judgment by Fraud and Misrepresentation," Plaintiff states:

> "Even should the three-judge tribunal take the necessary steps to make its judgment final with respect to the Assembly, such a judgment would still be vulnerable under Rule 60(b)(3) Fed.R.Civ.Proc. because it was secured by 'fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of ~~an~~ adverse party.' The misconduct which is the basis for this charge involves a shuffling of responsi-

> bility between Mr. Joseph Remcho and Ms. Barbara Brenner of Remcho, Johansen and Purcell so that they have been able to make contradictory statements and thereby mislead the Court." (15 Record 12.)

Plaintiff then reviews the withholding of the transcript of the hearing on the assembly plan for two years until it was too late for Plaintiff to use it (to impeach the credibility of the proponents of the assembly plan) in opposition to the Assembly's summary judgment. Plaintiff quotes Mr. Remcho's letter of June 30, 1982 which claims that "the transcript of a hearing on September 8, 1981 . . . was filed in the California Supreme Court case and I understood that you had access to it . . . ." (15 Record 12.) Plaintiff then observes,

> "After an unsuccessful search for such materials in the copy of Assembly v. Deukmejian filings maintained at the Sacramento law library of the California Supreme Court . . . Plaintiff noted in his affidavit of August 23, 1982: 'Mr. Remcho asserts that [the September 8, 1981 hearing

> transcript] was provided to Plaintiff as a party to the California Court proceedings, but no such [transcript] has ever been provided to Plaintiff.'" (15 Record 13.)

Plaintiff continues,

> "At the December 6, 1982 and February 16, 1983 hearings, in the presence of Ms. Barbara Brenner, Plaintiff protested the Assembly's continuing refusal to provide the September 8, 1981 hearing transcript; yet according to Ms. Brenner (at 8 Record 309), 'Counsel for the Assembly learned for the first time on May 17, 1983 that such a transcript now exists.'" (15 Record 13.)

Mr. Remcho's letter of June 30, 1982 (attached at 15 Record 23-24 as an exhibit to Plaintiff's memorandum) also states:

> "You request . . . [a] computer printout or other documentation I have for population figures we claim for the districts. All of that material was filed in the California Supreme Court case and I understood that you had access to it either by service from us or the other parties or because of your close work with the Republicans in that case. If your statement about what you need constitutes a request for that information and it is not otherwise readily available to you

> we will be happy to provide it once the Judge rules on the jurisdictional motion."

Plaintiff notes (at 15 Record 13) that he could find no such materials in the official copy of Assembly v. Deukmejian filings and that he checked with the attorneys who represented the Republicans in Assembly v. Deukmejian and was informed that they had received no such documentation of the Assembly's population claims. Plaintiff then quotes (at 15 Record 13) his August 23, 1982 affirmation that he had never received any such material from the Assembly and his protest at the Assembly's continuing refusal to provide them. Plaintiff then reviews (at 15 Record 15-17) the "big lie" technique employed by the Assembly over the next 21 months, whereby the Assembly first implied and then repeatedly stated that "The Assembly has already provided to Plaintiff all of the

information in its possession concerning the actual population of the 1982 Assembly districts," and, "The 'detailed population information' requested by Plaintiff in the 'Interrogatory Pursuant to Rule 33' is already in his possession, and had been since long before the Court entered summary judgment on behalf of the Assembly."

By far the most outrageous tactic used by the Assembly was providing materials allegedly also supplied to Plaintiff to Judge Karlton alone. When Plaintiff was finally able to secure these materials two whole years after (according to proof of service) he was supposed to have received them he was able to demonstrate that the Assembly had also employed its policy of systematic misrepresentation of the facts (regarding its own and alternative redistricting plans) during the Assembly v. Deukmejian

proceedings which led to the adoption of the contested districts. However, while these materials were withheld the Court issued one order eliminating most of Plaintiff's Assembly claims and another which granted a summary judgment to the Assembly on the remaining Assembly claims. Plaintiff's memorandum (at 15 Record 14-15) summarizes this episode of procedural sabotage by the Assembly:

> "Other crucial materials, which were provided to Judge Karlton (and according to proof of service also to Plaintiff) to 'demonstrate the extent to which all the issues were considered by the California Supreme Court' and that the Assembly's plan 'was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate' were withheld from Plaintiff for more than two years, and the Assembly now refuses to respond to discovery requests based largely on these materials even though the discovery requests were made within one month of Plaintiff's receipt of the materials. Mr. Remcho's letter of June 30, 1982 responded to Plaintiff's written request for these materials by trying to downplay their signfiicance: 'The material . . . is nothing other

than our original petition and memorandum and our response to the Court's 18 questions' and refused to supply a copy to Plaintiff until 'the Judge rules on the jurisdictional motion.' On August 23, 1982 Plaintiff protested the continued failure of the Assembly to provide these materials to him even though Judge Karlton had long since ruled on the pending motions. See 4 Record 310. On May 9, 1983 Plaintiff again protested the refusal of the Assembly to provide a copy of these materials. See 8 Record 177. Ms. Barbara Brenner responded to this protest in her rebuttal in support of summary judgment:

> 'Mr. Halliwell's rantings to the contrary cannot and do not establish that information has been withheld from him. At page 19 of his opposition, Plaintiff claims "materials filed by the Assembly with California Supreme Court in Assembly v. Deukmejian" have been withheld from him. Defendant Assembly is at a loss to understand exactly to what "materials" Mr. Halliwell refers . . . .' 8 Record 309.

In his brief of January 15, 1984 Plaintiff clearly identified the withheld materials in his fifth protest of the Assembly's refusal to provide them. See 11 Record 537-539. On June 5, 1984 the Assembly finally provided Plaintiff with a copy of materials which according to its proof of service it had provided on May 25, 1982. In its letter (13 Record 141) conveying

> these long-withheld materials the Assembly declared, 'We will oppose any and all efforts by you to reopen the issues concerning the Assembly' based on the contents of the withheld materials."

On July 9, 1985, two days before the Assembly's opposition to the above-quoted memroandum was due, the District Court ruled sua sponte that "this action is DISMISSED in its entirety, without leave to amend." (15 Record 202.) Counsel for the Assembly then cited this termination of proceedings as grounds for not responding to Plaintiff's charges regarding the Assembly's "fraud and misrepresentation." Ms. Barbara Brenner's letter of July 10, 1985 states:

> "I received today a copy of the Court's July 9, 1985 order dismissing your action in its entirety, without leave to amend. In light of that order, the Assembly takes the position that your pending 'Motion for Order Requiring Specific Objections to Inquiries' is no longer before the Court. We will therefore not be filing an opposition to that motion." (15 Record 351.)

b. Discovery Disputes with Senate

Plaintiff also was forced into a protracted struggle to secure essential information on the contested senate districts. However, the Senate never pretended to address the factual aspects of the case but instead challenged the Court's jurisdiction and refused to supply information sought by Plaintiff on jurisdictional grounds.

Section (i) infra summarizes efforts by Plaintiff to secure voluntary production of senate-district information before the Court ruled on the Senate's challenge to its jurisdiction. Section (ii) infra notes that although the order of March 27, 1984 declines to rule on the Senate's jurisdictional challenge it nevertheless dismisses Plaintiff's senate claim, ruling it would be "idle" to allow Plaintiff leave to amend his complaint, since the Court did not intend to grant

Plaintiff any relief anyway. Section (iii) infra sets forth Plaintiff's inquiries in support of his motion to reconsider the dismissal of his senate claim, the Senate's response to these inquiries, and subsequent proceedings on Plaintiff's motions to force the Senate to respond in a meaningful fashion to Plaintiff's inquiries.

i. Plaintiff's Efforts to Secure Voluntary Production of Senate-District Data

In his May 16, 1985 "Statement of the Case" Plaintiff reviews the background of his discovery dispute with the Senate:

> "Plaintiff's pending disclosure motion is the culmination of a protracted battle with the Senate to secure essential information on the Senate's redistricting plan which is under the exclusive control of the Senate. A review of the history of Plaintiff's previous efforts to secure by voluntary means the information sought demonstrates beyond question that Plaintiff has made a

determined good-faith effort before resorting to the pending motion.

"At 11 Record 470 Plaintiff quotes his own testimony at a September 8, 1981 legislative hearing:

> 'When the Senate came forth a week ago with their plan, our primary task -- I was at the Rose Institute at the time helping them there -- was to detect their districts. And then and only then could we commence our analysis of the districts. . . . [I]t was a little bit like we were trying to steal an official government secret. We had somebody standing up there, taking pictures of [a wall map] so we could go home and work [the districts] out on our computers.'

"At 4 Record 4-9 Plaintiff quotes from 'California Redistricting 1981: Proposition 6 Compliance,' a Rose Institute publication filed as an exhibit at the outset of Halliwell v. Eu:

> 'A detailed analysis of population equality in senate and assembly districts is not possible with the data provided by the proponents of either S.B. 99 or A.B. 300. Without a listing of "intended" populations in divided tracts, there is no way to separate intentional population disparities from drafting errors.'

"The Senate affirms at 4 Record 242:

> '[I]n reviewing population data compiled by our office,

> it appears that Senate District 22, in which Mr. Halliwell resides, has one of the smallest populations of the 40 senatorial districts ordered into effect by the California Supreme Court in January of 1982. In other words, the population of Senate District 22 is somewhat less than the ideal or average population of a state senatorial district, which would contain 591,714 residents.'

This is as close as the Senate comes to divulging a single fact about their redistricting plan. All of the Senate's other filings are totally bereft of factual statements.

"Plaintiff argued on August 23, 1982 at 4 Record 252:

> 'Mr. Rosin's affidavit [4 Record 240-242] completely avoids any actual population figures. To adequately prepare his case Plaintiff needs verifiable population figures for the contested districts. Because the language in the senate plan splits many census tracts by street a listing of smaller census units in split tracts and population allocation between districts is essential to district population verification.'

"Plaintiff argued on November 29, 1982 at 6 Record 22:

> 'There is no problem with technical corrections to senate districts, but the split tracts are often described by geographic features rather than

> population units. A listing of the census units and their populations in each portion of the tracts divided between senate districts is necessary to determine accurately the populations of these districts.'
>
> "The Senate argued on November 30, 1982 at 6 Record 33:
>
> 'As the Senate of the State of California contends that Plaintiff's action is moot, fails to state a claim and this Court lacks subject matter jurisdiction, it contends that no discovery should be permitted. However, should this Court not dismiss this action and Plaintiff ventures on a course of discovery, the Senate contends that the Plaintiff cannot proceed to make any discovery of and concerning the California Supreme Court and the California Legislature.'"
>
> (14 Record 191-193.)

Plaintiff's statement of November 29, 1982 and the Senate's statement of November 30, 1982 were made in status reports filed in response to the scheduling of a status conference on December 6, 1982.

> "At the December 6, 1982 status conference Judge Karlton indicated

a preference for 'the matter of jurisdictional motions which, of course, we want to hear' (Transcript at 17) and an intention to decide first 'the question of whether or not you are properly here' (Transcript at 20). Judge Karlton noted, 'The Senate denies subject matter jurisdiction and shall bring on a motion relative to that matter' (Transcript at 23), the disposition of which would determine 'whether we have a live lawsuit' (Transcript at 28).

"Therefore Plaintiff elected to defer formal discovery as recommended in Instituto Per Io Sviluppo Economico v. Sperti Products Inc. (1969) 530 F.R.D. 531, 532:

> 'Ordinarily pretrial inquiry into the merits of a claim will be held in abeyance until jurisdictional questions are settled. [Moreover,] this principle applies more particularly to pretrial discovery sought by the plaintiff rather than by the defendant.'"

(16 Record 373.)

ii. Court's Dismissal of Plaintiff's Senate Claim Without Ruling on the Senate's Jurisdictional Challenge

"Plaintiff tried unsuccessfully to secure population data for the 1982 senate districts from the Senate on August 23, 1982 (4 Record 25), again on January 25, 1983 (7 Record

324, 329), and yet again on May 19, 1983 (8 Record 193). The Senate has stubbornly refused to provide any factual basis for its only response to this aspect of Plaintiff's case, that senate district population disparities 'need not concern' the Court. See 4 Record 69.

"Plaintiff's senate district population disparity claim was therefore structured in terms of the average deviation, the only statistic which could be reliably calculated from the populations for a preliminary version of the Senate Plan, the only available population data. However, the order of March 27, 1984 rejected the average deviation as 'too imprecise to be accorded any meaning' unless it was treated as if it were the difference between largest and smallest districts. (See 12 Record 238.) The order of March 27 then concluded:

> 'Under ordinary circumstances this court would give the Plaintiff leave to amend his complaint to allege sufficient disparity between the actual and the ideal to state a claim for relief. In this case, however, the court is satisfied that amendment would constitute an idle act. For that reason, leave to amend will be denied, and the Plaintiff's complaint, insofar as it addresses the apportionment of the senatorial seats, will be dismissed with prejudice.' (12 Record 240.)"

(16 Record 374.)

Plaintiff protests this aspect of the order of March 27, 1984:

> "How a court can justify a dismissal with prejudice of a claim of unconstitutional population disparities when a legislature has prevented any determination of what these population disparities are is one of the vital questions raised in Plaintiff's motion for reconsideration of the order of March 27, 1984. For because the Legislature has refused to provide essential data under its sole control on its redistricting plans and Plaintiff has been allowed absolutely no discovery, it has been impossible to satisfy an essential prerequisite for injunctive relief established by the order of March 27, 1984:
>
> > 'Plaintiff has relied on the allegations in his unverified complaint and the statements in his memoranda of points and authorities. Plaintiff's bald assertions are inadequate to establish the factual predicates to the issuance of a preliminary injunction . . . . The plaintiff having failed to produce affidavits establishing the facts which might entitle him to a preliminary injunction, this court must, and will, deny the motion.' Id. at 13 (12 Record 246.)"
>
> (16 Record 376-377.)

iii. Plaintiff's Inquiries in Support of his Motion to Reconsider the Dismissal of his Senate Claim

"Thus because the Court dismissed Plaintiff's senate claim without ever ruling on the senate's jurisdictional challenge, Plaintiff had never had a reasonable opportunity for discovery. He was therefore entitled to seek compulsory disclosure of data which the Senate had refused to supply voluntarily (see Exhibit 2, 14 Record 260 for listing of Plaintiff's inquiries) and to seek reconsideration of the order of March 27, 1984 on the basis of this information." (16 Record 377.)

The inquiries listed at 14 Record 260 are:

"INQUIRY A-1 (DISCOVERY REQUEST) REGARDING CENSUS DATA ESSENTIAL TO ACCURATE COMPUTATION OF DISTRICT POPULATIONS

INQUIRY A-2 (DISCOVERY REQUEST) REGARDING AN EXPLANATION FOR MISSING DISTRICTS IN THE VERSION OF REAPPORTIONMENT LEGISLATION OF WHICH THE COURT WAS REQUESTED TO TAKE JUDICIAL NOTICE

INQUIRY B-1 (INTERROGATORY) REGARDING SENATE DISTRICT POPULATIONS AND SUBTOTALS FOR SPLIT CENSUS TRACTS

INQUIRY C-1 (ADMISSIONS REQUEST) REGARDING DISENFRANCHISEMENT OF SENATE DISTRICTS BY MEANS OF MISNUMBERING

INQUIRY C-2 (ADMISSIONS REQUEST) REGARDING NORTH-SOUTH SEQUENTIAL NUMBERING OF DISTRICTS

INQUIRY C-3 (ADMISSIONS REQUEST) REGARDING THE LESSER AMOUNT OF DEFERRED REPRESENTATION IN THE SEBASTIANI SENATE DISTRICTS THAN IN THE S.B. 99 SENATE DISTRICTS

INQUIRY C-4 (ADMISSION REQUEST) REGARDING CONCEALMENT OF CONSTITUTIONAL FLAWS IN SENATE DISTRICTS

INQUIRY C-5 (ADMISSION REQUEST) REGARDING DOCUMENTED CONSTITUTIONAL FLAWS IN THE CONTESTED SENATE DISTRICTS

INQUIRY C-6 (ADMISSION REQUEST) REGARDING AMELIORATION OF CONSTITUTIONAL FLAWS IN THE CONTESTED SENATE DISTRICTS"

Plaintiff's review of his discovery dispute with the Senate continues by noting the Senate's response to the above inquiries:

> "However, the Senate provided utterly superficial responses to Plaintiff's inquiries (see Exhibit 3, 14 Record 456-460) and opposed Plaintiff's disclosure motion with the argument that
>
> 'by virtue of the order entered on March 27, 1984, dismissing all claims regarding Senate

districts without leave to amend, the Senate can no longer be considered a party to this proceeding . . . . Despite [this] fact . . . Plaintiff continues to insist that he is entitled to take discovery from the Senate on the very claims dismissed by the Court. . . . Plaintiff is, however, entitled to no such discovery and the instant motion should be denied and sanctions assessed against Plaintiff pursuant to Rule 11.' (14 Record 120.)

"Plaintiff responds to this argument:

'The Senate's contention that it is not a party ignores the plain terms of Federal Rule of Civil Procedure 54(b), which states that "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and obligations of fewer than all the parties shall not terminate the action as to any of the claims or parties . . . ." The only exception to this requires a special Rule 54(b) certificate directing entry of final judgment as to a specific claim or party. No such Rule 54(b) certificate has been issued, and the Senate has not even requested one. Moreover, the Court continues to provide copies of all its orders to the Senate, so it is difficult to see how the Senate arrived

> at the notion that it is no longer a party.' (15 Record 57-58.)

"The Senate never responded to Plaintiff's complaint that in the absence of a Rule 54(b) certificate Plaintiff's senate claims were still an appropriate subject for discovery. The Senate instead sent Plaintiff a letter which threatened him with sanctions if he did not cease his attempts to obtain discovery from the Senate.

"Plaintiff contends in his April 18, 1985 'Response to the Senate's Threat of Financial Reprisal':

> 'On April 6, 1985 I received a letter [in which] Senate counsel states: "We are in receipt of [your] 'Motion for Disclosure Order Pursuant to Rule 37(a) F.R.CIV.PROC.' . . . . We view this purported motion as entirely inappropriate . . . . also . . . you have failed to comply with Rule 230-4 of the Local Rules of the United States District Court for the Northern District of California . . . [However, Plaintiff was in compliance with Local Rules of the Eastern District, where the case was being tried.] this failure renders your purported motion improper and fatally deficient. We will therefore expect that you withdraw said motion within seven (7) days of your receipt of this letter. Should you insist in pursuing this motion in contravention of the Local

Rules, the Senate will seek all appropriate relief, including monetary sanctions and attorneys fees against you personally." (14 Record 77-78.)

'The basic problem at issue is the Senate's having once again refused to respond to requests for information which would allow the Court to determine this case on its merits. . . . [M]onetary sanctions . . . are wholly inappropriate because the Senate's responses to Plaintiff's inquiries and its previous submissions in this case have been totally devoid of fact, and Plaintiff is clearly entitled to the information sought by his latest motion.

'The Senate's following response to Plaintiff's Inquiry B-1 (seeking "populations for each of the 40 senate districts, subtotals for divided census tracts, and a listing of the census population units in each segment of census tracts divided by geographic features") typifies its responses to Plaintiff's other requests for information:

> "The Senate objects to this discovery request on the following grounds: mootness, irrelevancy, not likely to lead to the discovery of admissible evidence, legislative privilege, separation of powers doctrine, harass-

> ment, burdensome, compound, vague and ambiguous, overbroad, work product privilege and oppressive."

'When Plaintiff refused to simply abandon his assembly and congressional claims the Assembly also threatened Plaintiff with financial reprisal. See 7 Record 15, 271-274. As Plaintiff noted then (at 7 Record 274):

> "If counsel for the Assembly really wishes to avoid further protracted proceedings relating to assembly districts they should provide the essential documents which they continue to withhold. These documents include . . . population listings for specific census units in each of the contested assembly districts."

The fact that the Senate has adopted the same tactic, threatening financial reprisal to avoid divulging the same type of information regarding its own districts, should cause any court interested in uncovering the truth regarding the contested districts to reject the Senate's efforts to avoid responding. When counsel for the state so personally threaten a plaintiff in propria persona for seeking only to defend his civil rights they violate the ethics of their profession; and since Plaintiff's disclo-

> sure motion is in fact thoroughly justified the Senate should respond to it on the merits.' (14 Record 81-83.)

"In his May 7, 1985 opposition to Plaintiff's disclosure motion, counsel for the Senate again threatened Plaintiff with sanctions. Counsel argued:

> 'The Senate has been forced to respond to Plaintiff's baseless discovery requests, to prepare this opposition to Plaintiff's motion, and will have to meet with Plaintiff pursuant to Local Rule 251 and attend a hearing in Sacramento on this utterly frivolous motion. On this basis, the Senate respectfully submits that it is entitled to an aware of attorneys' fees in the amount of $1,000.00, as set forth in the accompanying Declaration of Benjamin D. Scheibe. The Senate further submits that an aware of monetary sanctions is necessary to put an end to Plaintiff's continual disregard for this court's orders and his ongoing harassment of the California State Senate and the California State Assembly.[1]

"In his rebuttal Plaintiff responds to the Senate's threat:

> 'If Mr. Schiebe has expended anything close to $1,000's worth of his time to prepare a response to Plaintiff's "utterly frivolous motion" it must have been in a fruitless search for caselaw supporting his position. In

> any event, the effort of preparing a response to Plaintiff's motion has already been expended; yet Mr. Schiebe's letter of May 9, 1985 (attached) indicates a willingness to withdraw his threat of financial sanctions if Plaintiff will withdraw his motion. Clearly the purpose of this threat is not cost recovery but concealment of information.' (14 Record 231.)

"At a May 23, 1985 discovery hearing before Magistrate Mix the Court postponed a decision on Plaintiff's right to compel disclosure until after Plaintiff had a chance to respond to the Assembly's citations (not mentioned in briefing, but sprung at the hearing) and the three-judge panel had ruled on Plaintiff's motion for reconsideration of the order of March 27, 1984. The Senate withdrew its request for sanctions at the May 23 hearing but renewed it when Plaintiff filed a motion seeking 'Specific Objections to Inquiries' in lieu of the vague blanket rejection by the Senate (see 13 Record 456-460).

"Senate counsel's letter of June 25, 1985 to Plaintiff states:

> '[T]his letter will inform you that, if you continue to force the Senate to oppose your frivolous attempts at reversing prior orders, we will have no choice but to request that attorneys' fees be awarded against you.
>
> 'Please do not consider this a "threat of financial

reprisal," as you have termed my previous letters. Rather, please simply be advised that, should you refuse to withdraw, within seven (7) days, your June 22 motion insofar as it is directed to the Senate (thus forcing the Senate to file opposition papers), the Senate will request that substantial sanctions be issued against you and this request will not be withdrawn.' (15 Record 166-167.)

"Plaintiff replied to the Senate:

'[T]he March 27, 1984 order . . . was not accompanied by a Rule 54(b) certificate, which is necessary, in the circumstances, to terminate district court consideration of Plaintiff's senate claims. The Senate has not even asked for such a certificate.

'Nor has the Senate cited any case which suggests that the treatment of Plaintiff's senate claims by the order of March 27 (which under Rule 54 (b) "is subject to revision at any time") may be challenged on only legal rather than factual grounds. . . .

'Your letter states that it and your previous request for an order imposing sanctions against me should not be considered "a threat of financial reprisal." If your intent is simply to invoke the provisions of Rule 37(a)(4) you should cite some published authority

> which demonstrates that my motion is not substantially justified before you issue any ultimatum that I must withdraw my motion.' (15 Record 169.)
>
> "In its opposition to Plaintiff's motion seeking 'specific objections to inquiries' the Senate repeated its characterization of Plaintiff's motion as frivolous and argued:
>
> > 'Indeed, it has become all too apparent that Plaintiff will not cease his continued harassment of the Senate (and Assembly) absent imposition of substantial sanctions. For this reason, the Senate requests an award of not less than $1,000.00.'
>
> "No ruling was ever rendered on Plaintiff's discovery motions slated for hearing on July 25, 1985 nor on the Senate's request for sanctions, because shortly before the hearing the District Court ruled sua sponte, '[T]his action is DISMISSED in its entirely, without leave to amend.' (15 Record 202.)" (16 Record 377-385.)

c. Discovery Disputes with the Secretary of State

In support of his motion to compel a meaningful response to his inquiries submitted to the Secretary of State Plaintiff argues:

"Throughout these proceedings Defendant Secretary of State has refused to defend even her own official conduct. Even though county clerks implemented the contested districts on instructions from the Secretary of State (at a time when under Cline v. Lewis (1917) 175 Cal.315, 320 these districts had no legal status), Defendant argued that she lacked authority to change these instructions, since she is only 'a ministerial officer that certifies the list of eligible state candidates and measures that are to appear on the ballot and certifies the votes for such candidates and measures.' (5 Record 418.)

"Defendant then sought to be dropped as a party to this action. The Court's order of April 19, 1983 notes:

> 'Defendant MARCH FONG EU is sued herein in her capacity as California's Secretary of State. She has maintained throughout the course of this litigation that she is not the proper party defendant to an action challenging the apportionment of state electoral districts.' (8 Record 123.)

The order of April 19 concludes however, that

> 'the Secretary of State is the proper defendant to this lawsuit, in that she "is the chief election officer having statewide functions with respect to the election of state [legislators]." Yorty v. Anderson, 60 Cal.2d 312, 317 (1963).' (8 Record 124.)

However, when Plaintiff sought to force accountability by Defendant in accord with the order of April 19, 1983, the Secretary of State provided evasive responses to all of Plaintiff's formal inquiries.

"In response to Plaintiff's Interrogatory B-1 'Regarding Statutory Authority to Order Implementation of Redistricting Plans Prior to Their Legal Enactment,' Defendant refused to respond to Plaintiff's allegation that her preprogramming instructions 'circumvented referendum stay provisions by giving an administrative advantage to plans which under California law were precluded from use unless and until they were approved by the voters.' Plaintiff protested Defendant's evasiveness:

> 'In view of Plaintiff's unequivocal allegations (1 Record 9-11, 189, 199-203) that the Legislature's frivolous challenge to referendum petitions filed against their plans and the Secretary of State's preprogramming instructions were part of a conspiracy to force the use of districts biased in favor of Democratic candidates, a more forthcoming response to this inquiry is mandatory.'

But Defendant has maintained her total silence on this vital subject. See 14 Record 372-377 for details regarding Inquiry B-1.

"In Assembly v. Deukmejian proceedings Defendant and other Democratic petitioners urged immediate compliance with one person, one vote requirements as grounds

for using redistricting plans blocked by referendum petitions. Plaintiff's Interrogatory B-2 asks Defendant:

> 'Why was advance computer programming not also ordered for Republican-sponsored "minimum-change" plans which were administratively less complex and which complied more closely than the Democrat-sponsored plans with all constitutional requirements?'

In response to this inquiry Defendant denied that one person, one vote compliance was her reason for ordering preprogramming but declared, 'no answer is required' regarding what her reason for ordering preprogramming actually was. See 14 Record 378-381 for details regarding Inquiry B-2.

"Defendant at first refused to respond to Plaintiff's Interrogatory B-3 'Regarding a Conflict Between Defendant's Preprogramming Orders to County Registrars and Her Claim of No Responsibility for Actual Conduct of Elections' by arguing, 'Since the statements alleged in Interrogatory #3 were not made by Defendant, it is not possible to admit or deny the interrogatory.' However, Plaintiff provided a verbatim quote from Defendant's brief (5 Record 418) with virtually the same words as in Plaintiff's condensed version, and Defendant still refused to respond in spite of Plaintiff's citation of In re Folding Carton Antitrust Litigation (1979) 83 F.R.D. 260, 264: 'Objections to interrogatories must be

specific and be supported by detailed explanations why the interrogatories are improper.' See 14 Record 382-385 for details regarding Inquiry B-3.

"Plaintiff's Requests for Admissions C-1 and C-2 quote Defendant's own filings which admit that in the Legislature's plans 'the tripling of the number of ballot groups' resulted in 'absolutely critical' strains on the process of election administration. Plaintiff then asks:

> 'Does Defendant admit that there was no administrative barrier to adoption of these alternative redistricting plans [i.e., available model plans based on compact groups of whole counties, cities and census tracts] at the time she ordered advance programming by county registrars for the vastly more complicated plans devised by the Legislature and blocked by valid referendum petitions?'

"Defendant responds to these inquiries:

> 'Defendant cannot truthfully admit or deny the matter contained in [C-1 and C-2] for the reason that Plaintiff requests an admission regarding reapportionment plans which have not been presented to her by the Legislature, and therefore are not plans which she has reviewed for implementation.'

"Plaintiff argued that 'this response is clearly evasive and

designed to avoid exposure of the fact that Defendant and other Democratic officials have claimed imaginary practical advantages to justify the use of redistricting plans biased in favor of Democratic candidates.' Plaintiff pointed out the extensive analysis of these model plans already in the record and cited Rule 36(a) Fed.R.Civ. Proc.:

> 'An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he has made a reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.'

"To this Defendant answered that her

> 'inability to admit or deny these inquiries, however, is not based on lack of information or knowledge as its reason. Rather her inability to admit or deny is based on the fact that the Legislature has not presented her with a reapportionment plan. She is, therefore, not required to make a reasonable inquiry.'

See 14 Record 386-390 for details regarding Inquiries C-1 and C-2.

"Plaintiff's Admission Request C-3 deals with the delaying tactics used by Defendant to evade corrective action during the early months of this litigation, when the substitution of alternative districts could have been accomplished with a minimum of disruption. Plaintiff

asks:

> 'Does Defendant admit that Plaintiff's account of the circumstances of his service on [her chief counsel] Mr. Anthony Miller (1 Record 279-289) is accurate in all essential details and that the various defects in Plaintiff's service of papers complained of in her motions of March 9, 1982 (1 Record 20-26) and April 27, 1982 (2 Record 326) had no substantial impact on Defendant's rights?'

"Defendant responds to this inquiry:

> 'Defendant objects to request for admission #3, and therefore cannot truthfully admit or deny the statements contained therein.
>
> 'In Paragraph #3, Plaintiff requests an admission regarding the circumstances of service of the original complaint in the instant action. However, in its order filed July 1, 1982, this court dismissed Plaintiff's complaint, and allowed the filing of a Second Amended Complaint. [4 Record 39-40, 58.]
>
> 'Subsequently, Plaintiff filed a Second Amended Complaint and on August 18, 1982 Defendant filed an answer to it, thereby submitting to this court's jurisdiction.
>
> 'The admissions sought under request #3 are therefore not relevant to the subject matter of the pending action.

> They therefore do not fall within the scope of discoverable material under F.R.C.P. 26(b)(1) or 36.'

"Plaintiff responded to this objection:

> 'Even though the motions which are the subject of the inquiry were withdrawn by Defendant just before the Court was about to rule on them, they are of enduring significance in this case because of the delay in adjudication which they caused. They are significant also because of the run-out-the-clock strategy manifest in wave after wave of dismissal motions filed by Defendants, which continues to the present day as Defendant refuses to comply with the Court's briefing schedule regarding Plaintiff's April 20, 1984 congressional motion until the Court rules on her own April 20, 1984 dismissal motion. In Staub v. Baxley (1958) 355 U.S. 313, 320 the U.S. Supreme Court ruled out as contrary to due process of law procedures which "force resort to an arid ritual of meaningless form." A defendant whose counsel stands in a court whose jurisdiction and venue are unchallenged and argues repeatedly that proceedings should be delayed to cure a formal defect in her notification is clearly resorting to the most meaningless of arid rituals.'

"Defendant's only response to

this criticism was that so long as a respondent objects to the relevance of an inquiry, no further justification is necessary for a refusal to answer. Without making any response to Plaintiff's demonstration of relevance, Defendant simply states, 'Plaintiff's characterization of Defendant's response to C.3. as evasive is incorrect.' See 14 Record 391-394 for details regarding Inquiry C-3.

"The order of March 27, 1984 notes: 'The Court has previously determined that defendant Eu is the proper party to represent the interests of the congressional delegation.' (12 Record 253.) However, Defendant has never filed a responsive pleading to Plaintiff's congressional claim. While Defendant has stated with respect to Plaintiff's congressional claim that she 'could and would make a complete defense on the merits if it were necessary' (13 Record 130), she has never disclosed even the outlines of such a defense. In addition to handicapping Plaintiff's congressional discovery by refusing to discuss such pivotal topics as potential justifications for congressional district population disparities, Defendant has evaded the congressional inquiries Plaintiff has developed from what information is available to him.

"With respect to Discovery request A-1 regarding 'Defendant's Orders Mandating Unauthorized Revisions to Congressional Districts Contrary to Their Unambiguous Legal Descriptions' Defendant refuses to

respond because these revisions allegedly 'are not relevant to the subject matter of the pending litigation.' Defendant has maintained this posture in the face of numerous precedents cited by Plaintiff which hold that 'relevance for discovery purposes is not limited to the precise issues framed by the pleadings.' See 14 Record 366-371 for details regarding Inquiry A-1.

"With respect to Admission Request C-5 regarding 'Documented Violations of Article XXI in the Contested Congressional Districts,' Defendant objects that Plaintiff has no independent claim on this topic. However, Plaintiff responds to this objection that 'Since there is a clear link in Karcher v. Daggett (1983) 103 S.Ct. 2653 between respecting municipal boundaries and allowable population disparities the relevance of this inquiry does not depend on any other claim.' See 14 Record 401-405 for details regarding Inquiry C-5.

"With respect to Admission Request C-6 regarding 'Amelioration of the Congressional Flaws in the Contested Congressional Districts' Defendant objects that Plaintiff's proposed whole-precinct swaps among A.B. 301 congressional districts were designed to improve compliance with state as well as federal constitutional requirements. Defendant's objection to this inquiry also ignores Karcher v. Daggett supra, which affirms the relevance of 'alternatives that might substantially vindicate [state] interests yet approximate population

equality more closely.' Id. at 2663-2664. See 14 Record 406-412 for details regarding Inquiry C-6.

"Plaintiff sought to compel Defendant to provide less evasive and more specific answers to his formal inquiries, but no ruling was ever made on his motion. One postponement occurred because the Assembly did not cite a single case in support of its refusals to respond but held cases that had been available for years in reserve for the hearing on Plaintiff's disclosure motion. See 14 Record 439. Another postponement was secured by Defendant to allow her counsel to prepare his version of the Discovery Stipulation required by Local Rules. See 15 Record 1-2. Negotiations over the Discovery Stipulation were protracted (see 15 Record 271-321). Plaintiff was never able to secure specific objections to aspects of the case which he considered relevant, and even though he agreed to the inclusion of all of Defendant's suggestions (see 15 Record 299-303), agreement still could not be achieved. Two days before Defendant was required to file her version of the Discovery Stipulation the District Court acted sua sponte to terminate the action 'in its entirety.' See 15 Record 202." (16 Record 385-394.)

4. Plaintiff's Congressional Claims

Plaintiff discusses the District Court's excuses for taking no action on his congressional claim during the first two years of Halliwell v. Eu at 16 Record 471-473:

> "From the outset of Halliwell v. Eu Plaintiff has challenged the constitutionality of California's congressional districts. When the Court first ruled on this matter in its order of November 1, 1982, it proclaimed:
>
> > '[T]he court notes that the challenged plan was adopted for this election only by the California Supreme Court, and that in doing so that court concluded that it was far and away the most satisfactory plan available in terms of compliance with the one person, one vote mandate. Assembly v. Deukmejian, 30 Cal.3d at 674. At least at this stage in the proceedings, we must give some deference to the finding of the California Supreme Court. Thus we cannot say that Plaintiff now enjoys a substantial chance of succeeding on the merits of his challenge to the congressional districting plan.' 5 Record 481.
>
> "In fact there is no mention of congressional district populations anywhere in Assembly v. Deukmejian, and the referenced page

deals with state legislative districts:

> '[I]t is clear that there are no compelling reasons why the 1981 reapportionment statutes governing the Assembly and Senate should be discarded for the old, unconstitutional districts of 1973. This temporary plan allows the primary and general elections to be held in districts that more nearly comply with the constitutional mandate of one-person, one-vote.' 30 Cal.3d at 674.
>
> "At the December 6, 1982 status conference Judge Karlton shifted his ground: he sought to bar consideration of Plaintiff's congressional claim until Plaintiff's summons and complaint had been served on each of California's 45 incumbent congressmen individually. However, in its order of April 19 the full panel rejected the congressional dismissal motion brought on pursuant to Judge Karlton's suggestion.
>
> "On January 7, 1983 Plaintiff filed a motion to shorten the terms of the congressmen elected in 1982 and hold a special election for the balance of the term in November of 1983. The Court simply allowed the date for Plaintiff's proposed special election to pass without ruling on this motion."

Plaintiff discusses his continuing effort to secure remedial action on his congressional claim after the Court

failed to act on his January 7, 1983 term-shortening motion, at 17 Record 111-112:

> "Although the order of April 19, 1983 denied a motion to dismiss Plaintiff's congressional claim for failure to join indispensable parties and identified the Secretary of State as being responsible to defend the interests of the State, she did not provide a responsive pleading to Plaintiff's congressional claim.
>
> "When the District Court failed to act on Plaintiff's term-shortening motion in time to hold special elections coterminous with the November 8, 1983 city general elections, Plaintiff complained to the Court on December 6, 1983 and January 15, 1984, urging action on a revised motion for injunctive relief 'to salvage some vestige of constitutional government.' (10 Record 15.)
>
> "In his March 13 memorandum Plaintiff complained (at 12 Record 160):
>
> > 'None of the Defendants has attempted to justify the population disparities in either the 1981 or 1983 congressional redistricting plans. Unless some response is promptly provided to this aspect of Plaintiff's case the Court should enter a default judgment in favor of Plaintiff and grant him the congressional aspect of the injunctive relief he

> requests in accompanying motions [for term-shortening and barring use of the contested districts for the 1984 elections].'"

Plaintiff continues his chronology of the Court's treatment of his congressional claim at 16 Record 473-474:

> "In its order of March 27, 1984 the Court comments regarding Plaintiff's claim challenging the allocation of population among the congressional districts:
>
> > 'For reasons which must be obvious to the parties, the Court harbors serious reservations about the adequacy of the complaint. Although a court may act on its own initiative in dismissing a complaint which does not state a claim upon which relief can be granted, the Court must provide the Plaintiff with notice and an opportunity to address the matter. Wong v. Bell, 642 F. 2d 359 (9th Cir. 1981).' Id. at 19-20 (12 Record 252-253).
>
> Because no defendant has ever filed a responsive pleading to Plaintiff's congressional claims, the order of March 27 ruled:
>
> > 'The Court has previously determined that Defendant Eu is the proper party to present the interests of the Congressional delegation. The Court will, therefore, order the

> Plaintiff and Defendant Eu to brief the sufficiency of the Plaintiff's complaint insofar as it challenges the constitutionality of the Congressional districts.' Id. at 20 (12 Record 253)."

The order of March 27 also called for briefing on Plaintiff's long-pending congressional motion and additional documentation of the congressional disparities claimed. (See 12 Record 255.)

Defendant ignored Plaintiff's documentation (12 Record 477-452) of a population disparity in excess of 7,000 between largest and smallest districts and the caselaw showing this to be unconstitutional. Instead her counsel declared that, "Defendant could and would make a complete defense on the merits if it were necessary." (13 Record 130.) Defendant first claimed to have inadvertently failed to respond to Plaintiff's congressional motion (13 Record 98-100) and then flatly refused to respond to this

motion. (13 Record 446-447.)

Plaintiff's response to Defendant's refusal to complete briefing on his congressional motion states:

> "Defendant's opposition to motion to compel Defendant's response to motion for congressional elections states that 'no responsive papers to the April 20 motion were filed by the deadline because of the misleading nature of Plaintiff's moving papers.' If Defendant's counsel was in fact misled by the motion in question his confusion has long since been rectified. If counsel were really seeking 'the most expeditious and efficient procedure' for resolving the problem created by his failure to respond to Plaintiff's motion he would have simply filed his response to Plaintiff's motion.
>
> "In fact Mr. Maness is desperately reluctant to present the 'complete defense on the merits' he claims (at pp. 2-3 of his brief of May 29, 1984) would demonstrate that 'no genuine constitutional harm was committed.' Had this court wished to consider in a factual vacuum whether Plaintiff's congressional claims were subject to dismissal it would not have invited Plaintiff to present evidence 'establishing the truth of Plaintiff's factual assertions.' Since Mr. Maness surely realizes this he is clearly resorting to tactics

> 'interposed for delay' in direct violation of Rule 11 of Federal Rules of Civil Procedure. This transparent run-out-the-clock strategy must not be allowed to succeed. This court therefore should insist that counsel for Defendant comply, albeit belatedly, with the terms of its order of March 27, 1984." (13 Record 488.)

The Court made no attempt to enforce its briefing schedule and delayed ruling on Plaintiff's congressional claim for more than a year, by which time Plaintiff's proposed remedy was obsolete, but closely related revised remedies were still feasible. Then the Court declared Plaintiff's congressional claim moot because "the relief sought has become impossible to grant due to the passage of time." (15 Record 199.)

The District Court tried to bolster its finding of mootness with the following reasoning:

> "All parties appear to concede that the 1982 plan is no longer in oper-

> ation[*] because it was defeated in a referendum election by the voters of California. Nor is the Supreme Court plan in operation, the Legislature having adopted a new plan. This is, therefore, not a case of the defendant voluntarily ceasing it conduct as the result of the lawsuit; it was the action of other persons, not party to the litigation, which mandated the cessation of the challenged conduct. See Iron Arrow [Honor Society v. Heckler (1983) 104 S.Ct. 373] at 375-76 (concerning voluntary acts of third parties as sufficient to cause a case to become moot)." (15 Record 201-202.)

Plaintiff responds to this reasoning in his motion for reconsideration of the Court's mootness finding:

> "In Halliwell v. Eu Plaintiff has stressed from the outset and provided demonstrations of the fact that the contested districts and their essentially unchanged successors were imposed by means of political collusion of Democratic officials in the legislative, executive

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*Plaintiff had demonstrated at 8 Record 514-522 that the replacement congressional districts were 90% unchanged from the 1982 plan and that population disparities were still unconstitutional under the standards set forth in Karcher v. Daggett (1983) 103 S.Ct. 2653.

> and judicial branches of government.
>
> "Moreover, Iron Arrow (104 S. Ct. at 375) stresses that there must be 'discontinuance of challenged activities' and that 'there is no reasonable likelihood that the wrong will be repeated.' Perpetuating the grievances challenged in a lawsuit, as the new districts unequivocally do, completely destroys any support for a finding of mootness that might be gleaned from Iron Arrow supra. This is especially so since the A.B. 301 plan is the very plan adopted by the California Supreme Court, so when the Legislature (both houses of which are defendants in this lawsuit) replaced the court-ordered plan it was simply replacing a plan which it had originated." (15 Record 253.)

In his motion for reconsideration Plaintiff notes several controlling precedents raised in briefing before the Court ruled Plaintiff's congressional claim moot which flatly preclude a finding of mootness:

> "The fact that the new districts perpetuate and indeed aggravate the flaws of the plan originally challenged by Plaintiff is stressed in his May 11, 1984 opposition to dismissal at 16:20-17:26 (13 Record 22-23):

'Plaintiff has documented at 10 Record 187-189, 10 Record 332-355, and 10 Record 171-176 the facts showing that the new congressional districts are essentially unchanged from those used in 1982 and that the minor changes which have been made have increased the population disparities among congressional districts (approximately doubling the maximum disparity from 7,000 to 14,000). Wright & Miller (in Federal Practice and Procedure § 3533) note:

> "Passage of new legislation that does not satisfy the principles urged in attacking old legislation similarly does not moot the attack. . . . Any other conclusion would have created a superb method for resistant legislatures to avoid Supreme Court review." Id. at 278-279 . . . .

'In American Party of Texas v. White (1974) 415 U.S. 767, the opinion notes:

> "Since it was a temporary measure, this primary financing legislation has expired and it has been replaced by new legislation . . . . The new legislation is also comparable to its predecessor [so the] . . . recent amendments to the 1972 . . . law have not mooted this controversy. . . .

> [I]n view of the special nature of election challenges in general and this short-term . . . measure in particular, we proceed to evaluate appellants' claims on the merits." Id. at 791 n. 23.' (15 Record 232-233.)

"Moreover, even if there were no close similarity between the districts now in use and those originally challenged by Plaintiff, Democratic Party of the United States v. Wisconsin (1981) 450 U.S. 107, 115 n. 13, quoted by Plaintiff at 18:6-18 of his May 11, 1984 opposition to dismissal (13 Record 24), squarely rejects mootness for even a one-election court order:

> '"[E]ven if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.' Rosario v. Rockefeller, 410 U.S. 752, 756 n. 5 . . . ."'"

(15 Record 234-235.)

"In Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576, (a case cited by Plaintiff at 13 Record 475-476 in support of his August 3, 1984 rebuttal in behalf of his motion to reconsider the order of March 27, 1984,) Justice O'Connor notes:

> 'When collateral effects of a dispute remain and continue to affect the relationship of

> litigants, the case is not moot.' Id. at 2591.

Moreover, the residual effect in Stotts, a few months' advantage in seniority gained before the laid-off white firemen were rehired, is similar in its continuing impact to the advantage of incumbency in politics.

"Plaintiff happens to be represented by Congressman Mel Levine, one of the six new Democratic Representatives elected from specially tailored malapportioned districts in 1982, so the following ruling of the Stotts court is also appropos:

> 'As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. Powell v. McCormack, 395 U.S. 486, 496-498 (1969).'" (15 Record 242.)

Plaintiff concludes his motion for reconsideration with this protest:

"During the more than two years since the order of April 19, 1983 [in which the Court at 8 Record recognized the Secretary of State as the proper defendant to represent the interests of the State] the Court never required anyone to file a responsive pleading to Plaintiff's congressional claims, never required Defendant to respond to Plaintiff's congressional discovery requests, never held a hearing on Plaintiff's allegations of clearcut violations of Karcher v. Daggett supra by the

> contested congressional districts, and never even followed through on the Court's commitment (in the order of March 27, 1984) to require briefing on Plaintiff's proposal for congressional injunctive relief even though Plaintiff supplied all the supplemental documentation of his congressional claims suggested by the order. What this court has done is wait until it judged that the claim set forth in Plaintiff's complaint was moot, refused Plaintiff leave to update his complaint, and dismissed the action. Such a style of adjudication would be an abuse of discretion in any case. But it is considerably more than this in a case for which Congress has mandated expedited consideration and required the hearing to be held 'at the earliest practicable day' (28 U.S.C. § 2284(b)(2)), a case involving rights of millions of Californians which the Supreme Court in Wesberry v. Sanders (1964) 376 U.S. 1, 17 calls the most precious of all rights in a free country which if undermined may cause other rights, even the most basic, to become illusory." (15 Record 265-266.)

The District Court refused to hold a hearing on Plaintiff's motion for reconsideration or even to allow completion of opposition and reply briefing as required by Local Rule 230. Instead the Court ruled Plaintiff's motion insuffi-

cient to warrant such treatment because "Plaintiff's basis for seeking reconsideration is a disagreement with the Court's reasoning," and, according to Judges Kennedy, Karlton and Ramirez, "The appropriate method for challenging this court's reasoning is an appeal to an appropriate tribunal." (See 15 Record 354.)

5. Plaintiff's Assembly Claims

In his response to the order of March 27, 1984 Plaintiff argues:

> "The order of March 27, 1984 brushes aside the holding of Gaffney v. Cummings [(1973) 412 U.S. 735, 750] that the number of people involved is a factor in the constitutionality of state legislative district population disparities, the holding of White v. Regester [(1973) 412 U.S. 755, 763-764] that the average deviation from the ideal population is more important in determining constitutionality than the maximum disparity, the holding of Brown v. Thomson [(1983) 103 S. Ct. 2690, 2696-2697] that the prima facie threshold for state legislative population disparities simply shifts the burden of proof, the

> holding of Connor v. Finch [(1977) 431 U.S. 407, 418] that the prima facie threshold applies only in the context of legislatively enacted apportionment, and the holding of Roman v. Sincock [(1964) 377 U.S. 695, 710] that even minor deviations from the ideal population in state legislative districts must be free from any taint of arbitrariness or discrimination. The order then proclaims that it would be idle to allow Plaintiff an opportunity to amend his complaint since he cannot be expected to demonstrate a violation of the population equality standard which this court has established." (12 Record 311.)

Plaintiff discusses the "Fallacious Use by This Court of Population Equality Standards Applicable Only to Legislatively Enacted Redistricting Plans" in his response to the order of March 27, 1984:

> "The order rejects (at 7) Plaintiff's contention that Connor v. Finch (1977) 431 U.S. 407 mandates stricter population equality standards for a plan adopted by the California Supreme Court than for a plan enacted into law by a state legislature, and (at 16) the order cites Connor v. Finch at 418 in support of the contention that the redistricting plans adopted by the California Supreme Court for the 1982 senate and assembly elections

do not violate the Equal Protection Clause so long as the maximum population deviations in these plans are less than 10%. However, Connor v. Finch at 418 refers to '"under-10%" deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionment.' Emphasis added.

"The order (at 7) also rejects the applicability of Chapman v. Meier (1975) 420 U.S. 1, where the Court ruled:

> 'We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than de minimis variation.' Id. at 26-27.

The order (at 7) rejects this standard on the ground that:

> 'The relationship of a federal district court to a state is quite different from the relationship of the state's highest court to the state. The court assumes that the state's highest court is far better equipped to identify and implement competing state interests than is the federal district court; thus the rule that court-ordered apportionment plans are subject to severe constraints has no application to apportionment plans adopted by the state's highest court.'

"A state supreme court undoubt-

edly has broader latitude in defining state policy than a federal court, but this does not vest the state court with the power to 'reconcile conflicting considerations in the people's name,' which is the rationale for allowing minor population disparities in legislatively enacted apportionment plans. See Reynolds v. Sims (1964) 377 U.S. 533, 586. Chapman v. Meier places no limitations on a state court's authority to define state policy which may provide a basis for greater than de minimis population disparities, while a federal court may be restricted to invocation of policies already defined by state government; however, Chapman does require that whatever court devises a state legislative plan articulate an appropriate rationale for any unnecessary population disparities among districts:

> 'Where important and significant state considerations rationally mandate departure from these standards it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.' Id. at 26.

Not only did the California Supreme Court not articulate any considerations which mandated departure from the Chapman standards for court-ordered plans, the California court itself invoked these standards to justify the adoption of its state legislative redistricting plans, noting that 'the High Court has held

that a court-ordered plan, such as that which established California's old districts, must be held to higher standards than a state legislature's plan. (Chapman v. Meier (1975) 420 U.S. 1, 26.)' Assembly v. Deukmejian (1982) 30 Cal.3d 638, 667. In such circumstances it is illogical and unreasonable for this panel to refuse to allow a challenge to these same districts on the basis that they do not in fact comply with the Chapman standards.

"Moreover, even if the Chapman standards were not applicable, California's own population-equality standards for court-ordered plans are only slightly less strict and would invalidate the contested state legislative districts even if population disparities are as small as the proponents of these districts have claimed. See Legislature v. Reinecke IV (1973) 10 Cal.3d 396.

"The United States Supreme Court has found it necessary to admonish the Ninth Circuit that it must adjudicate potentially dispositive state law claims under pendent jurisdiction, and this panel simply must heed this admonition. See Schmidt v. Oakland Unified School District (1982) 73 L.Ed. 2d 245." (12 Record 322-324.)

Plaintiff discuss the "Evidentiary Inadequacy of Assembly's Population Claims" in his response to the order of March 27, 1984:

"The Assembly has suggested that if Plaintiff wishes to challenge the validity of the alleged district populations it has presented in an affidavit by Mr. James Tucker, Chief Counsel to the Assembly Committee on Elections and Reapportionment, he must reconstruct the entire assembly plan from raw census data and the legal descriptions of the district. This would be an extremely time-consuming process under the best of circumstances, since the contested assembly districts are so convoluted and involve so many split census tracts and block groups that it cost the Assembly several hundred thousand dollars to have them constructed in the first place; but because there are several hundred discrepancies (8 Record 49-82) between the descriptions of the districts in the enacting legislation and those actually used to conduct the 1982 elections the task is impossible.

"Mr. Tucker's affidavit only establishes what Mr. Tucker thinks the assembly district populations are. At 8 Record 166 Plaintiff notes:

> 'Plaintiff does not doubt that the Assembly's computers do in fact compute the population figures attested to in Exhibit A by James Tucker; but unless the Assembly is willing to provide a printout showing how it arrives at the populations it uses for split census tracts it is impossible to evaluate the accuracy of the Assembly's data base.'

Plaintiff's position is supported by Proof of Facts 2nd Volume 16, 'Computer Evidence' § 13 at 297: '[supporting quotation].'

"By refusing to supply the best evidence of its population claims, verifiable census data, the Assembly fails to meet ordinary evidentiary standards, much less those required for summary judgment. Since Plaintiff requested supporting census data the adverse inference rule is applicable. '[Supporting quotations].'

"Since the nearly universal practice in reapportionment cases is to document district populations with census data, as the proponents of the A.B. 301 congressional districts sought to do in Assembly v. Deukmejian [(1982) 30 Cal.3d 638] P.R. Mallory & Co. v. N.L.R.B. (1968) 400 F.2d 956, 969 precludes the Assembly's attempt to prove district populations with affidavits.

> 'In Neiderhofer v. Automobile Ins. Co. of Hartford, Conn., 7 Cir., 182 F.2d 269, 271, we pointed out that failure to produce evidence, which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it.'

"Hoffman v. Commissioner of Internal Revenue (1962) 298 F.2d 784, 788 provides another example of the unacceptability of secondary evidence derived from documents under the exclusive control of a litigant.

> 'In spite of the fact that the books and records of the taxpayer were, as has been indicated, meager, and in no sense comprehensive of his business, he never offered them in evidence although he had them available in court. Here the rule may be invoked that the failure of a party to introduce evidence within his possession gives rise to the presumption that, if produced, it will be unfavorable to him. [Citations].'

This same concept is squarely affirmed in I.N.A. Aviation Corp. v. United States (1979) 468 F.Supp. 695, 700.

> 'An inference that relevant evidence would be unfavorable is also justifiable where it is within the control of a party in whose interest it would naturally be to produce it and he fails to do so, without satisfactory explanation, and instead produces weaker evidence or no evidence. [Citation.]'"

(12 Record 335-340.)

Plaintiff discusses "Plaintiff's Rebuttal Evidence Ignored by This Court" in his response to the order of March 27, 1984:

> "In spite of the Assembly's refusal to provide the population data essential to verification of

its population figures or any data at all except the alleged district populations this court has granted the Assembly a summary judgment [on the following grounds]:

> 'The Plaintiff vigorously disputes the figures proffered by the Assembly, but not in any legally cognizable way. The United States Court of Appeals for the Ninth Circuit has repeatedly held that a party opposing another's motion for summary judgment must counter the moving party's affidavits or declarations with affidavits or declarations of his own, and failure to do so will result in granting the motion.' [12 Record 248.]

"The order of March 27, 1984 is certainly incorrect when it states (at 15-16):

> 'The Plaintiff herein, while questioning the validity of the Assembly's figures in his memorandum of opposition, has not supplied the Court with a single declarattion from a competent witness that rebuts or qualifies the Assembly's figures.'

Plaintiff used the Assembly's own affidavits to show that the population figures in Mr. Tucker's affidavit were unreliable. At 8 Record 166 Plaintiff cited the affidavit of Bruce Cain, special consultant to the Assembly Committee on Elections and Reapportionment, which was included in the Assembly's motion for summary judgment (see 8 Record 39):

> 'Dr. Cain admits that "In certain cases, it appeared necessary to split an enumeration district in order to ensure population equality among Assembly districts. Such splits are inherently somewhat imprecise, because one cannot be sure of the population in each half after the split."

Dr. Cain does not specify the number of instances where populations were estimated for split units or the procedure which was used for these estimates. In his analysis of split population units in the congressional plan Plaintiff has demonstrated (1 Record 121) that misallocation of populations by as little as 10% can create serious errors in population computations. Dr. Cain notes that only four of the split population units in the A.B. 300 assembly districts could be reunited "without upsetting the balance of population equality," so it is clear that the population figures supplied by James Tucker are untrustworthy if only for this reason alone.'

"Plaintiff has also provided a declaration (see Exhibit C-2 of Inclusive Complaint) by T. Anthony Quinn, the chief reapportionment consultant of the Assembly minority, which demonstrates the unreliability of Mr. Tucker's population figures. Dr. Quinn notes that even

under generous assumptions (which Plaintiff has shown are not true) 'The total range of deviations is at least 6.7% (the smallest district is the AD 78 with a population deviation of -3.6% and the largest district is the AD 25 with a population deviation of +3.1%).' See 4 Record 7. The Tucker declaration claims a total range of deviation of only 3.9%. At 8 Record 165-166 the reason for the discrepancy is noted:

> 'In Exhibit C-2 (1 Record 274) to Plaintiff's inclusive brief Dr. Tony Quinn points out that the Assembly districts in A.B. 300 were drawn using precincts rather than census population units as the original data base. This procedure maximizes the accuracy in determining the political complexion of districts but drastically increases the number of population errors, since population units divided between precincts may be lost track of and consequently be partially omitted or included twice.'

"Dr. Quinn's version of the population of 25 AD, one of the districts where his disagreement with the Tucker declaration is the greatest, is supported by figures from the Rose Institute, as Plaintiff noted at 4 Record 10:

> 'The 25 A.D. may be taken as an example of what discrepancies may exist, since it was involved in a dispute over Voting Rights Act compliance so the Rose Institute carefully

> checked the census units assigned to it by A.B. 300 and Mr. Remcho's corrections list. The Rose Institute determined that this district's population is 304,975 (cf. "Redistricting California 1981: Statistics"). In Exhibit A [the Tucker declaration] the population listed for 25 A.D. is 300,093 -- almost 5,000 less than the Rose Institute figure, which places this district more than 3% above the ideal assembly district population.'

Plaintiff noted (at 8 Record 170-171) that it was impossible to demonstrate what the correct population of 25 AD was because the Assembly refused to supply basic population data and the district included divisions of census tracts along lines other than those used in census tabulations. (One of these lines was along a highway as it had existed ten years before.) At 8 Record 169-170 Plaintiff quoted his earlier challenge to the validity of the Assembly's population figures at 4 Record 10 and noted: 'Even though the Assembly is now moving for a summary judgment, it has never sought to rebut this or any other of Plaintiff's criticisms of statistics supplied by the Assembly.'

"The Court does not explain how it concluded that the affidavits of Bruce Cain and Tony Quinn and the population figures from the Rose Institute did not at least cast doubt on the accuracy of the populations attested by James Tucker and thus require that summary judg-

ment be denied." (12 Record 351-354.)

Plaintiff then argues that even if the Court did not find his rebuttal evidence persuasive, the Assembly's refusal to supply population data needed by Plaintiff to defend against summary judgment was itself sufficient to preclude granting the Assembly's motion. Since the Assembly clearly would have divulged the data used to derive their claimed district populations if these data actually proved that the Assembly's population claims were accurate, Plaintiff concluded:

> "As for the credibility of the evidence provided by the Assembly when weighed against the standard required for a summary judgment, Plaintiff can only repeat his statement of January 15, 1984:
>
> > 'If anything at all was learned from the discrepancy between the transcripts of the tape rec. dings provided under sworn affidavit and the actual recorded conversations among the conspirators in the Watergate episode, it is that in a con-

> spiracy case, no court should trust indirect evidence when those charged with complicity in the conspiracy have direct evidence which they refuse to provide.' 11 Record 536. (Emphasis in original.)"
> (12 Record 357.)

In support of his motion for reconsideration of the Assembly's summary judgment Plaintiff argues:

> "The Assembly has never directly challenged the validity of Dr. T. Anthony Quinn's figures for the A.B. 300 assembly districts which are found in Exhibit C-2 of Plaintiff's original complaint. (For the convenience of the Court and the parties a copy of the computer printout portion of the Quinn affidavit with the key districts marked is attached as pp. 27-28 infra.) Plaintiff includes in this filing his own affidavit, which provides documentation for the Quinn population figures.
>
> "Plaintiff's affidavit includes the complete text of corrections to A.B. 300 enacted on September 20, 1981 by cleanup legislation (A.B. 2150) and codified as § 30012 of the California Elections Code. No other corrections to the 1981 Assembly plan are acknowledged by West's Annotated California Codes, and none have ever been approved by the Legislature nor the California Supreme Court.
>
> "The maximum population dis-

parity of 18.92% noted by Dr. Quinn is unaffected by the officially approved corrections to A.B. 300 since this disparity is between 10 AD and 70 AD and neither of these districts is changed by the corrections.

"Plaintiff has also computed the maximum disparity without considering 70 AD, since the legislative intent regarding this district is impossible to determine from the text of A.B. 300. After correcting typographical errors in A.B. 300 where legislative intent can be determined from the descriptions of other districts, the 10.11% population disparity among districts other than 70AD noted by Dr. Quinn is reduced only slightly to 10.07%." (13 Record 148-149.) (Emphasis in original.)

"Plaintiff has demonstrated that all of the versions of the 1981 Assembly plan with any legal status contain population disparities greater than 10% and that the determination of the true population disparities in the version with proponents' wholesale revisions which they prefer to call 'technical corrections' has been obstructed by the refusal of the Assembly to provide essential data under its sole control. No matter what constitutional standard this court may wish to apply in assessing one person, one vote compliance in the 1982 assembly districts, the proper sequence is (a) determination of the underlying facts and then (b) ruling of the constitutionality vel non of the contested districts. A ruling

> that proponents need not prove their 'inherently somewhat imprecise' population claims but need only prove that the maximum population disparity is less than 10% would amount to an advisory opinion. Such a ruling would make it necessary for the U. S. Supreme Court to remand the case for further factual determinations should it decide that where the actual population disparity falls between 4% and 10% is constitutionally significant." (13 Record 162.) (Emphasis in original.)

The Assembly was able to find very little to say in response to the grounds cited by Plaintiff for reconsideration of the summary judgment granted to the Assembly, and in fact the portion of its opposition which actually addressed the merits of reconsideration amounted to less than a page. The Assembly filled out the bulk of its brief in opposition to reconsideration with a detailed examination of the procedural status of the case which was presented in support of the Assembly's concluion that the District Court did indeed have jurisdiction

to entertain Plaintiff's motion.

The first of two observations by the Assembly which is actually directed to Plaintiff's entitlement to reconsideration states:

> "In considering Mr. Halliwell's motion to vacate, however, one should bear in mind that his attack on the 1981 districts gives new meaning to the word irrelevant. Those districts were used in 1982. Entirely different districts are now in place and have already been used in the 1984 primary." (13 Record 431.)

Plaintiff responds to this objection:

> "At 8 Record 530-537 Plaintiff has demonstrated that the average assembly district is 92% unchanged from the previous district with the same number. Fifty-seven of eighty districts have only trivial changes or no changes at all. In every instance significant modifications have only served to make the district more secure for the incumbent elected in 1982. Thus the Assembly's claim gives new meaning to the phrase, 'entirely different.'
>
> "Moreover, even if the 1984 districts were free of the constitutional defects in their predecessors the advantage of incumbency gained from the 1982 elections

precludes any finding of mootness regarding Plaintiff's challenge to the constitutionality of the 1982 districts. In Firefighters Local Union No. 1784 v. Stotts (1984) 104 S.Ct. 2576, 2584 the U.S. Supreme Court affirms:

> 'As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute. Powell v. McCormack, 395 U.S. 486, 496-498 (1969).'

In Stotts Justice O'Connor notes in her concurring opinion:

> 'When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot.' Id. at 2591." (13 Record 475-476.)

The Assembly's other point which is responsive to Plaintiff's motion is:

> "We add only that Plaintiff's tedious analysis of the Quinn affidavit [13 Record 179-196] and his argument that the corrections to the 1982 districts were not authorized [13 Record 197-199] are irrelevant. Those elections were conducted in districts with populations set forth in the Declaration of James Tucker. Declaration of James Tucker in Support of Assembly's Opposition to Petition for Temporary Injunction, filed October 26, 1983. Even if Mr. Halliwell's assertions were correct -- and they are not -- what counts for equal protection purposes

> are the districts in which the elections were actually conducted. Mr. Tucker provided that information to the Court and this Court has upheld the constitutionality of those districts. The case has been rightly decided, the matter is in any event moot and no grounds for reconsideration exist." (13 Record 440-441.)

Plaintiff responds to this objection by pointing out that if the corrections were not authorized and if they substantially changed the districts which were actually adopted by the state agency with the authority to do so, then the districts used in the election are patently illegal for this reason alone. Plaintiff also points out that the lack of authorization for the corrections was not a mere technicality; instead it was directly linked to the Assembly's misrepresentation to the State Supreme Court of the actual characteristics of the assembly redistricting plan.

> "If the proponents of A.B. 300 had petitioned the California

Supreme Court for a revised court order incorporating hundreds of departures from the unambiguous terms of A.B. 300 this would have undermined the 'administrative feasibility' rationale for adopting the A.B. 300 districts. It also would have directed the Court's attention to the gross constitutional violations in A.B. 300 which the 'technical corrections' sought to ameliorate. Neither the Assembly nor the Court has cited any authority for the proposition that a court of law should evaluate the constitutionality of any version of a redistricting plan other than that established in law. [Emphasis added.]

"Ever since Yick Wo v. Hopkins (1886) 118 U.S. 356 any power to make 'technical corrections' committed 'to the unrestrained will of a single public officer' has been ipso facto grounds for invalidation. 'In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.' Id. at 372. Emphasis in original. See 3 Record 394-396." (13 Record 477.)

"Even if the California Supreme Court had duly authorized the Secretary of State to implement revised versions of 85% of the assembly districts mandated by Assembly v. Deukmejian the Assembly has not provided any intelligible description of these revised districts, much less proven what the popula-

tions of these districts are.

"Item 5 of Dr. Michael Halliwell's Declaration of June 6, 1984 notes that even Dr. Bruce Cain, a principal architect of the 1981 assembly plan, admits that it is impossible for any statistician to verify the Assembly's population claims with the materials available to Plaintiff.

"Item 6 of Dr. Michael Halliwell's Declaration of June 6, 1984 notes that the Assembly's population claims are based on population estimates rather than on census data in a number of crucial instances. The Assembly refused to respond to this criticism when it was put forward as a legal argument, and the Assembly continues to evade this issue even though the basic facts have now been incorporated in a sworn affidavit." (13 Record 479-480.)

6. Plaintiff's Senate Claims

In his response to the order of March 27, 1984 Plaintiff argues:

"In seeking to show that Plaintiff's challenge to the constitutionality of population disparities in the contested senate districts is unworthy of adjudication the order of March 27, 1984 seriously distorts the nature of this claim. The order states (at 17) that

'[Plaintiff] asserts that the populations of California state legislative districts are so large that the rule of "as

> precise as possible" applicable to congressional apportionment ought to be the rule in California's state legislative apportionment.'

In actuality, in discussing the fact that the California Supreme Court had allowed an average deviation of only 2,300 in California senate district populations Plaintiff has argued that

> 'it is easily demonstrated that the Senate's districts are especially vulnerable on equal protection grounds due to their large populations and correspondingly large deviations from population equality.
>
> > "[O]ne reason advanced by the U.S. Supreme Court in White v. Weiser [(1973) 412 U.S. 783, 790] for requiring stricter population equality standards for congressional districts was because an ideal congressional district generally had a much larger population than a typical legislative district. California state legislative districts are, perhaps, the only exception to this generalization." Legislature v. Reinecke IV (1974) 10 Cal.3d 396, 411.
>
> This consideration is also noted as relevant in defining the reasonable population equality requirements of Article XXI. See 64 Cal.Ops.Atty. Gen. 597, 606. The absolute

> size of senate district population disparities is an even stronger consideration following the 1980 census, for a California senate district now has an ideal population more than 10% larger than a California congressional district. While the precise mathematical equality standard for congressional districts is not applicable to California's senate districts, neither are the percentage deviations allowed in other states with smaller district populations.' 10 Record 204-205."

(12 Record 313-314.)

In his response to the order of March 27, 1984 Plaintiff argues:

> "In its search for a rationale for refusing to consider the partisan gerrymandering aspect of this case this court has repeatedly contradicted itself.
>
> "After Plaintiff had protested that Judge Karlton had interpreted the Equal Protection Clause as if it did not apply to Republicans the full panel responded in its order of April 19, 1983:
>
> > 'There is certainly something to be said for the notion that the Equal Protection Clause protects members of minority political groups from intentional discrimination in the reapportionment process.' 8 Record 121.
>
> But the panel also noted, 'There is

not, however, any fundamental right to proportional representation based on political affiliation' 8 Record 123. In the supplemental briefing requested by the order of April 19 Plaintiff noted (at 8 Record 255-257) the difference between disproportionate political representation and systematic dilution of Republican voting power, the latter being the basis of his partisan gerrymandering claims (5 Record 274-275 and 287-296).

"The order of March 27, 1984 (at 5-6) returns to Judge Karlton's position that Republicans do not enjoy the protection of the Fourteenth Amendment:

> '[T]he Plaintiff's allegation that the apportionment plan discriminates against Republicans avails him nothing. There is no authority for the proposition that a reapportionment plan that discriminates on the basis of political party offends the Equal Protection Clause.'

"In refusing to recognize as unconstitutional systematic population disparities which discriminate against a political party the order of March 27 also contradicts the position taken by the panel on this point when it affirmed Judge Karlton's order of July 1, 1982 on April 19, 1983. In his order of July 1 Judge Karlton notes:

> 'I do not mean to suggest that the alleged distortion of election districts to serve political ends is irrelevant to the question of whether

> deviations from absolute population equality are justifiable under the standards set out in Wesberry v. Sanders, 376 U.S. 1 (1964) and Mahan v. Howell, 410 U.S. 315 (1973).' 4 Record 49.

The fact that the panel has now abandoned this position does not affect the validity of the proposition that population disparities that are not unacceptable per se may be unconstitutional if used as a device for political favoritism. See Roman v. Sincock (1964) 377 U. S. 695, 710.

"The order of March 27, 1984 notes (at 5-6),

> 'Dicta to the contrary notwithstanding, the United States Supreme Court has never invalidated an apportionment plan that reflected the majoritarian party's exercise of its superior power. The Supreme Court has invalidated only those apportionment plans which neutralize or exclude racial or ethnic minority groups.'

The Supreme Court has indeed recognized that racial or ethnic minority groups may be 'subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process' San Antonio School District v. Rodriguez (1973) 411 U.S. 1, 28. But the fact that political groups do not enjoy this extraordinary protection does not place members of these groups outside the scope of

> the Fourteenth Amendment, which states, 'nor shall any state . . . deny ANY person within its jurisdiction the equal protection of the laws.' Emphasis added. (12 Record 325-327.)

In support of his motion for reconsideration of the dismissal with prejudice of his senate claim by the order of March 27, 1984 Plaintiff argues:

> "The majority opinion in Assembly v. Deukmejian (1982) 30 Cal.3d 638 mentions that a 75.4 percent maximum deviation in the senate districts adopted eight years previously by the California Supreme Court 'is a per se violation of the United States Constitution,' id. at 667; but it makes no mention of the population disparity in the new senate districts which the court mandates. Population disparities in the newly enacted senate districts, the double representation of two districts (6 SD and 32 SD) and of a majority of a third district (12 SD) and the total disenfranchisement of two other districts (11 SD and 37 SD) plus the disenfranchisement of 2/3 of another (13 SD) has emasculated the goal of equality of representation to the point where a smaller minority of California's population could control the Senate (43.5% versus 46.4%) than if the districts based on the 1970 census had been left in place.
>
> "Plaintiff has unsuccessfully

requested population data for the 1982 senate districts from the Senate on August 23, 1982 (4 Record 25), January 25, 1983 (7 Record 324, 329) and May 19, 1983 (8 Record 193). The Senate has stubbornly refused to provide any factual basis for its only response to this aspect of Plaintiff's case, that senate district population disparities 'need not concern' this court. See 4 Record 69. Plaintiff has recently (May 24, 1984) written to counsel for the Senate renewing and clarifying his request for population data but has received no response. While the contested senate districts are not clouded by the sort of unauthorized 'technical corrections' which have hindered Plaintiff's population analysis of the 1982 congressional districts and totally obstructed his analysis of the 1982 assembly districts, there are thirteen senate districts where thirty-eight census tracts are divided by geographical features and thus make it impossible for Plaintiff to compile accurate population statistics for the senate plan.

"Prior to the order of March 27, 1984 Plaintiff had reason to believe that an average deviation of more than 6,000 was enough larger than the largest average deviation heretofore found acceptable by the U.S. Supreme Court in a state legislative plan (1,359 in White v. Regester (1973) 412 U.S. 755) to (coupled with the taint of discrimination (proscribed by Roman v. Sincock (1964) 377 U.S. 695, 710) arising from the fact that most

> Democratic districts had smaller populations than most Republican districts) constitute a cognizable claim in the view of this court. Since the Senate has never disputed the factual basis for this claim, Plaintiff did not employ compulsory disclosure procedures to force the Senate to produce population data. Even if the actual populations of the 1982 senate districts turn out not to support any violation of the equality of representation guaranteed by the Fourteenth Amendment, this fact should be a matter of record.
>
> "Unlike the assembly and congressional representatives elected in 1982, the senators elected from the districts mandated by Assembly v. Deukmejian have served less than half of their terms of office, so there is no basis at all for declaring the constitutionality of the 1982 senate districts to be a moot issue.
>
> "In Connor v. Finch (1977) 431 U.S. 407, 417, n. 13 the Supreme Court ruled that 'the District Court should explain the genesis of the population figures on which it relies.' Surely in light of this standard, it would not be an idle act to allow Plaintiff to pursue his claims regarding the 1982 senate districts at least to the point where accurate populations for these districts are a matter of record." (13 Record 163-165.)

The Senate makes no attempt in its opposition to reconsideration of the

dismissal with prejudice of Plaintiff's senate claim to rebut Plaintiff's factual assertions, including the Senate's refusal to supply essential population data under its sole control. Nor does the Senate dispute Plaintiff's interpretation of governing precedents which the District Court has overlooked or allegedly misapplied. Instead the Senate argues:

> "In ruling that Plaintiff had not, and could not, assert claims upon which relief could be granted with regard to the court-ordered reapportionment of California's Senate Districts, this Court noted that the reapportionment plan ordered into effect by the California Supreme Court and challenged by Plaintiff has been superseded by a subsequent reapportionment statute enacted by the Legislature and signed into law by the Governor. (Order of March 27, at 8:6-12, 12: 23-25.) The Court thus found that even had Plaintiff been able to identify constitutional defects in the Court-ordered reapportionment plan, prospective relief designed to remedy such defects would be unnecessary and perhaps even counter-productive since the districts implemented by the California Supreme Court would soon be phased out of existence and replaced by

the districts as constructed by the subsequently enacted reapportionment plan.

"Other than the passage of time, nothing of any significance has occurred since the date of entry of the Order of March 27. No new facts or circumstances have surfaced which might in any way alter the Court's analysis, as contained in that Order. Nor have subsequent decisions of any other court called into question the reasoning employed by this court in dismissing, with prejudice, Plaintiff's claims. As a result, there is no basis for this court to now do a complete 'about face' and completely reverse its prior decision.

"Indeed, the fact that four months have passed since the entry of the Order of March 27 serves only to bolster the strength of the analysis employed by the Court since the State is now that much closer to the date upon which the Court-constructed Senate Districts will have been completely phased out of existence and replaced by the legislatively enacted Senate Districts, the constitutionality of which is not before this Court. As a result, the rationale underlying the Court's dismissal of Plaintiff's claims regarding alleged population disparities is even more compelling at this point in time. For this reason, Plaintiff simply is not entitled to an order reopening these claims." (13 Record 424-425.)

The only point raised in the

Senate's opposition to reconsideration, that the 1982 senate districts were near to being "completely phased out of existence," was untrue, as Plaintiff points out in his rebuttal:

> "In fact less than half the terms of senators elected in 1982 has transpired. Moreover, if a vacancy should occur because one of the senators elected in 1982 dies or resigns a special election will be held in the same district as was used for the 1982 elections." (13 Record 484-485.)

The following statement was true in July 1984, when the Senate filed its opposition to reconsideration of the order of March 27, 1984:

> "Nor have subsequent decisions of any other court called into question the reasoning employed by this court in dismissing, with prejudice, Plaintiff's [senate] claims." Emphasis added.

However, the statement in the order of March 27, 1984 (at 12 Record 238), "There is no authority for the proposition that a reapportionment plan that discriminates

on the basis of political party offends the Equal Protection Clause.", subsequently was squarely rejected in Davis v. Bandemer infra.

In arguing that the dismissal of his senate claim cannot stand in the face of Davis Plaintiff has petitioned the Ninth Circuit:

> "Moreover, the Ninth Circuit has a clear duty to vacate this dismissal in light of Davis v. Bandemer (1986) 106 S.Ct. 2797, 2807, where the Supreme Court determined that 'the political gerrymandering claim in this case is justiciable,' and the Court notes, 'As Gaffney [412 U.S. at 751-752] demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability.' Id. at 2806." (16 Record 268.)

In support of his revised proposal to ameliorate the effects of senate district misnumbering Plaintiff describes "Continuing Partisan Advantage Derived from Senate District Misnumbering" at 12-13 of his memorandum:

"The main purpose of the misnumbering of senate districts was to gain a permanent advantage for Democratic candidates for the balance of the decade. The tactic of cancellation of senate elections in areas where they are scheduled to occur and holding them early in other areas allows the party which designs the new districts to get double duty from their own strongholds while disenfranchising the most adverse segments of the electorate. This makes it possible to unseat even the most popular senator by allowing the incumbent no opportunity to seek re-election.

"In Item 9 of the June 19, 1984 Declaration of Dr. Michael Halliwell an average shift of 9% in favor of Democratic candidates is documented between three districts where senate elections were due and three districts where elections were held two years early. The misnumbering of state senate districts made it possible for the Democratic Party to win 16 of the 20 senate elections which took place in 1982 even though about half the electorate usually supports Republican state legislative candidates. Even when double representation and disenfranchisement last only for two years the incumbency advantage gained from misnumbering persists, so we are not dealing with '[a] hypothetical problem which time alone will very shortly resolve,' as the order of March 27 states (at 12)." (13 Record 483-484.)

In support of his revised proposal

to ameliorate the effects of senate district misnumbering Plaintiff argued:

> "The misnumbering of senate districts in the 1982 plan has not been remedied by the 1984 plan. Forcing Senator Doolittle to run for re-election in 1982 after only two years in office is not an adequate substitute for the holding of an election in 6 SD in 1984, when it should have taken place. The fact that after 1985 6 SD will be represented by only one senator does not make the unconstitutionality of the 1982 election a moot issue until the term of the improperly elected interloper expires. Likewise, Senator Schmitz and all other potential candidates were victimized when the people of his district received no opportunity to elect a senator in 1982; this can be mitigated if an election is held in 1984 in 32 SD. The people of Butte County were victimized along with Ray Johnson, the senator from this county, when the senate election scheduled for 1984 in this county was cancelled; this aspect of the deferred representation issue will not become moot until December 1988." (12 Record 369.)

In support of his revised proposal to ameliorate the effects of senate district misnumbering Plaintiff also argued,

> "Plaintiff's original motion for a preliminary injunction called

for special elections to be held on November 8, 1983. When this proposal became obsolete because no decision had been reached by this court prior to the proposed special election date, Plaintiff revised his motion to call for special elections on June 5, 1984. While this tribunal ruled on the revised motion before its operative date, by the time a transcript needed for an appeal had been prepared, June 5, 1984 also had passed into history. As was the case with the appeal immediately preceding the November 1982 election, Plaintiff must now submit a revised remedy which is still feasible at the time of the appeal.

"Because this court rejected a proposal for special elections in revised districts in part because of the inevitable delay which would be required to decide on appropriate replacement districts, this motion proposes in most instances that the effects of senate district misnumbering be ameliorated by holding special elections in the districts provided in the 1982 senate plan. In the case of 12 SD and 13 SD the misnumbering is corrected by the smallest change in these districts which will restore the proper sequence of elections." (13 Record 212.)

The Senate's opposition to Plaintiff's revised misnumbering remedy states:

"Plaintiff's instant motion for injunctive relief seeks the

invalidation of election results in certain specified 1982 State Senate races and the ordering of special elections in replacement districts. What Plaintiff has neglected to bring to this court's attention is the fact that (1) a prior application for provisional relief based upon the identical claim of 'misnumbering' and seeking virtually the identical relief, was rejected by this court's Order of March 27, 1984; and (2) subsequent to the entry of that Order, he filed a Notice of Appeal, pursuant to 28 U.S.C. § 1253, seeking review of the denial of the application for injunctive relief in the United States Supreme Court. As a result of Plaintiff's appeal, this court has been deprived of the jurisdiction to even consider Plaintiff's renewed request for injunctive relief." (13 Record 414.) Emphasis in original.

Plaintiff responds to this objection:

"There is a close similarity between Plaintiff's motion calling for special elections in certain senate districts, timed so that runoffs would take place along with the November General Election, and Plaintiff's prior motion, which would have scheduled special elections so that runoffs would coincide with the June Primary Election. However, Plaintiff's motion of June 20, 1984 in most instances seeks special elections in the appropriate 1982 districts, while the prior version of Plaintiff's motion proposed

> revised districts for use in special elections. Moreover, this court has insisted that when the relief originally requested has been mooted by the passage of time a fresh motion seeking a revised remedy is necessary. See Transcript of December 6, 1982 status conference at 15. Indeed, the Assembly insisted on October 29, 1982 that a proposal for injunctive relief similar to that rejected by this court on October 27, 1982 be also submitted to this court before the proposal could serve as a proper vehicle for an appeal:
>
> > '[Plaintiff' proposes that the elections be held but the results not be announced. This latter request was not even presented to the District Court and is therefore not appropriate for review in the United States Supreme Court. Rule 44.4.' 5 Record 488."
>
> (13 Record 482-483.)

The Senate's opposition to Plaintiff's revised misnumbering remedy also states,

> "Plaintiff, by his previous application for injunctive relief, asked this court to unseat the State Senators sitting in Senate Districts 6, 12 and 32, and to order the holding of elections in replacement districts. (See Order of March 27, at 11:18-21.) By his current application, Plaintiff again seeks the invalidation of election results in

these districts and the holding of special elections. Moreover, the asserted basis of Plaintiff's current application is identical to the asserted basis for the prior application -- his allegations that the State Senate Districts ordered into effect by the California Supreme Court were somehow 'misnumbered'.

"That Plaintiff seeks simply to resurrect the very claim previously rejected by this court -- indeed, the very claim which is now the subject of a pending appeal -- is confirmed by a simple review of his moving papers. Thus, Plaintiff's 'Supporting Memorandum' consists almost solely of verbatim quotes from the colloquy between the Court and varoius counsel during the February 16 hearing on Plaintiff's prior application for injunctive relief. In addition, Plaintiff reiterates that, as with the previous application, the basis for the instant request is his longstanding claim that the numbering of the Districts implemented by the California Supreme Court is constitutionally defective.('Plaintiff's Revised Motions and Supporting Memorandum', at 3:4-10.) It is thus clear that Plaintiff simply believes the Court's prior ruling on this issue to be erroneous and now seeks to relitigate this issue despite the pendency of his appeal." (13 Record 415-416.)

Plaintiff responds to this objection:

"Plaintiff hopes, by drawing attention to the Senate's evasiveness at the hearing on senate district misnumbering, to elicit some response by the Senate to the aspects of the case which the Senate has sought to obscure. Not only has the Senate continued to refuse to address the substance of the Court's inquiries, it has completely stalemated analysis of the populations of the contested senate districts by withholding population data under its sole control.

"Since the Court did not follow Plaintiff's suggestion (at p. 28 of Plaintiff's memorandum supporting his revised motions for injunctive relief from senate district misnumbering) that it rule immediately on his proposals for remedial special elections the Court must have expected the Senate to respond to the Court's request for briefing with (a) some clarification of the Senate's evasive posture at the February 16, 1983 hearing [13 Record 215-239], (b) some comment by the Senate on Plaintiff's evidence of senate district misnumbering [13 Record 244-270] (since the Senate had previously claimed an absence of such evidence), or (c) some comment by the Senate on the specifics of Plaintiff's special election proposals [13 Record 240-243]. The failure of the Senate to file any meaningful response indicates more clearly than ever that the contested senate districts are indefensible and therefore the Senate still hopes to merely continue to delay these proceedings until injunctive relief

is no longer feasible." (13 Record 486-487.)

7. Plaintiff's Board of Equalization Claims

No defendant has ever filed a responsive pleading to Plaintiff's Board of Equalization claim, and his arguments in support of this claim have never been challenged:

> "The central issue in Plaintiff's Board of Equalization claim is noted in his January 15, 1984 protest against this court's protracted refusal to adjudicate:
>
> > 'Furthermore, Judge Karlton cites NO INTERPRETATION OF CALIFORNIA LAW which precludes any of Plaintiff's claims. Probably the clearest example of politically motivated unequal protection of the laws accorded by the California Supreme Court to California Republicans involves diametrically opposite APPLICATIONS of the post-census redistricting requirement of Article XXI: where a redistricting plan for the Board of Equalization was available which complied with all the requirements of Article XXI and was not barred from being put into effect by a referendum challenge the Supreme Court aided the Democratic Party by requiring the use of

> the old Board of Equalization districts in 1982; where the Democratic Party stood to gain from new districts for the State Legislature which flouted the requirements of Article XXI and were blocked by valid referendum petitions, the California Supreme Court ordered the new districts into effect.' 11 Record 78."

(16 Record 63-64.)

In his summary of the "Constitutional Basis for Plaintiff's Board of Equalization Claim" Plaintiff continues,

> "Plaintiff argued on December 6, 1983:
>
> > 'Federal caselaw requires redistricting every 10 years to comply with the one-person-one-vote principle. The Board of Equalization had been redistricted in 1972 and was due for redistricting; but the old districts were used instead.' 10 Record 208.
> >
> > 'In Reynolds v. Sims (1964) 377 U.S. 533, 583-584 the U.S. Supreme Court ruled that ". . . although undoubtedly reapportionment no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period . . . . such an approach would clearly meet the minimal requirements for maintaining a

reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practically desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."' 10 Record 217-218.

'Probably the clearest possible denial of the Equal Protection of the laws is application of the same law in opposite ways so as to favor the party in power and hurt the party out of power. Article XXI requires redrawing congressional, state legislative and Board of Equalization districts within two years of the federal census according to criteria set forth in the Article; yet the California Supreme Court ordered the 1982 congressional and state legislative elections to be conducted in new districts (which had been blocked by referendum petition and which flagrantly violated the criteria of Article XXI) but then refused to use a Board of Equalization redistricting plan (which had not been blocked by referendum petitions and which fully conformed with the criteria of Article XXI). Instead the Court ordered the 1982 elections to be conducted in the old Board of Equalization dis-

> tricts. See 1 Record 219-221. This highly selective enforcement of Article XXI of the Constitution by the State Supreme Court in deference to the wishes of the legislative leadership was clearly politically motivated; the results speak for themselves.
>
> 'First, the old districts represented by Democrats had an aggregate underpopulation of about 800,000 people in each house, but as a result of the 1982 elections in the new districts Democratic strength in the State Legislature increased . . . . Quite a different picture is presented by the Board of Equalization election, in the old districts. The only district with a Republican incumbent was overpopulated by about 800,000 people. Only this one Republican was elected in 1982; the Republican candidate in an adjacent Board of Equalization district lost by less than 1% of the vote.' 10 Record 207-208.

"At 15 Record 362 Plaintiff quotes a March 3, 1982 press account which notes the circumstances which gave rise to his Board of Equalization grievance and Defendant's position on this issue:

> 'The State Supreme Court denied [the Secretary of State's] petition asking the Court to draw new lines for the Board's four districts. Her request was in response to the Legislature's repeated failure

> to fulfill its constitutional duty to equalize districts according to 1980 census figures. The Court, in denying her petition without comment, gave no indication of how the seven Justices voted on the matter.
>
> 'Eu said she was "surprised" and "disappointed" by the Court's refusal to intercede. "It (the Court) was deeply concerned about malapportioned legislative and congressional districts in January when it decided that the reapportioned districts should be used," Eu said in hearing that the Court refused to act on the Board's districts [and continued,] "Apparently there is no similar concern about the grossly malapportioned Board of Equalization districts."'
>
> For further details concerning Plaintiff's Board of Equalization claims see Case Index and Appendix Items 114.11, 114.17, 114.21, 114.31 and 114.39. [Continued in footnote: The Case Index filed on August 31, 1985 summarizes each contribution and gives page and line references to the Case Record. The Case Appendix which accompanies this brief gives the full text of the contributions summarized in the Index.]" (16 Record 65-68.)

In his memorandum urging action by the Court on "several matters never addressed and still left hanging . . .

[including] Plaintiff's Board of Equalization claim" Plaintiff observes:

> "Plaintiff's Second Amended Complaint states (at 4 Record 71):
>
> 'V. BOARD OF EQUALIZATION
>
> 'Plaintiff's own Board of Equalization district and the adjoining district both deviate from the ideal population by about 800,000 people. The Secretary of State urged the California Court to apply the principles of Assembly v. Deukmejian [(1982) 30 Cal.3d 638] and require Board of Equalization redistricting according to the 1980 census. The Court refused to do this or to explain its reason for not doing so.'
>
> "The only answer to this portion of his complaint which Plaintiff has ever received from any defendant was a reaffirmation by the Secretary of State of her support of Plaintiff's position:
>
> 'Defendant Secretary of State admits the allegation that she petitioned the California Supreme Court to adjust the Board of Equalization districts with respect to conducting the 1982 elections. [4 Record 245.]
>
> "Plaintiff certainly is entitled to know the outlines of a potential defense of the challenged Board of Equalization districts . . . ." (15 Record 361.)

After noting a newspaper account of

the reasons why the Secretary of State favored Board of Equalization redistricting in 1982, the memorandum states: "Plaintiff has continued to seek an adjudication of his Board of Equalization claim even though he was handicapped by the absence of a responsive pleading to this claim." (15 Record 362.) The memorandum then discusses election mechanics which precluded pre-election Board of Equalization relief, notes Plaintiff's January 6, 1983 effort to secure action on his Board of Equalization claim, and continues:

> "In the 'Revised Proposal for Interim Special Elections' section of his December 6, 1983 brief Plaintiff proposed:
>
> > '[S]pecial elections should still be held in those districts where constitutional flaws demonstrably changed the outcome as required by [Hamer v. Campbell (1966) 358 F.2d 215, 222] . . . Because of the extreme closeness of the Collis-Ivers Board of Equalization contest (and the malapportioned districts used for the

> 1982 BOE elections) a new election should [now] be held for this office, using the district in A.B. 2X with the most population in common with the 1982 district.' (10 Record 28-29.)

"On March 13, 1984 Plaintiff renewed his 'Motion for Special Elections Where Constitutional Flaws in Districts Used in 1982 Demonstrably Changed the Election Outcome'. Plaintiff argued:

> 'Prior to the 1982 General Election Plaintiff tried unsuccessfull to persuade this court to adopt a standard for determining which elections should be invalidated because the unfair advantage to the winner from unconstitutional gerrymandering was greater than the margin of victory. [After renewing his December 6, 1983 special BOE election proposal the March 13, 1984 memorandum continued,] As was the case in Duncan v. Poythress (1981) 515 F.Supp. 327, 343, those improperly elected in 1982 should not be allowed to run as incumbents in the special elections.
>
> 'Prompt action on this proposal is required if run-off elections are to be held simultaneously with the June 5, 1984 presidential primary, thereby ensuring a representative turnout in these run-offs.' (12 Record 157-158.)

"Clearly Plaintiff is entitled to a decision by this court on his long-standing motion for a special Board of Equalization election

before this action is terminated. A ruling without briefing on Plaintiff's Board of Equalization claim would be a gross denial of due process, since there has been no opposition of any sort provided to this claim. Besides Plaintiff's own right to try to defend this claim before it is swept aside, the U.S. Supreme Court has noted its own need for briefing by the parties to assure 'that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions.' See Baker v. Carr (1962) 369 U.S. 186, 204.

"The California Supreme Court is the logical entity to defend against Plaintiff's Board of Equalization claim, since none of the present defendants has any stake in this issue. In arguing against joinder counsel for the California Supreme Court stated: 'The opinions of the California Supreme Court stand upon their own merits.' (13 Record 550.) However, this statement does not apply to the action of the California Court requiring the use of the 1972 Board of Equalization districts for the 1982 elections, since in this instance the Court issued no opinion. Therefore, unless the full court is willing to overrule Judge Karlton's denial of joinder this court should notify the California Attorney General that another special appearance is necessary in order for the constitutionality of the 1982 Board of Equalization election to be

defended." (15 Record 365-368.)

After another half-year of the District Court's refusal to act on Plaintiff's Board of Equalization claim, Plaintiff complained:

> "Plaintiff's Board of Equalization claim and his repeated efforts to secure action on this claim are discussed in detail at 15 Record 361-368 of Plaintiff's August 9, 1985 motion 'seeking action on several matters never addressed and still left hanging by the order of August 5, 1985'. For seven months this court has ignored Plaintiff's August 9, 1985 request for action on his Board of Equalization claim. It therefore appears increasingly likely that this court intends to treat this claim in the same manner as it treated Plaintiff's congressional claim: wait until the 1982 terms of office have expired, then declare the claim moot.
>
> "Plaintiff urges this court to reconsider any such policy of deliberate inaction and to decide his Board of Equalization claim on its merits. To facilitate this, Plaintiff proposes revised Board of Equalization remedies that are equitable under current circumstances and which minimize disruption fo the ongoing electoral process." (16 Record 64.)

Plaintiff's memorandum argues in

support of his revised Board of Equalization remedies:

> "At 12 Record 40-52 Plaintiff provides 'PRECEDENTS FOR FEDERAL INVALIDATION OF ELECTIONS AND SHORTENING OF TERMS OF ILLEGALLY ELECTED OFFICEHOLDERS.' These precedents support Board of Equalization term shortening where the most Republican district was overpopulated by 800,000 and a heavily Democratic district was underpopulated by a like amount. The ideal population for each of the four Board of Equalization districts is ten times the 591,714 noted by Alan G. Rosin's affidavit for each of the forty senate districts (see 4 Record 242); therefore the population disparity among Board of Equalization districts used to conduct the 1982 elections was 27%. A population disparity of this size flouts the requirements of Abate v. Mundt (1971) 403 U.S. 182, 187, which set the limit for this type of district at 11% where 'there is no evidence of a built-in bias tending to favor particular political interests or geographic areas', see Brown v. Thomson (1983) 103 S.Ct. 2690, 2697. Moreover, the numerical size of Board of Equalization population disparity compounds the violation of Abate, which notes that where 'legislative districts may have a much smaller population . . . slightly greater percentage deviations may be tolerable.' 403 U.S. at 185. Emphasis added.
>
> "Even if this court should

decide that the district from which Mr. Collis is now running for re-election to the Board of Equalization is free from constitutional defects, the fact remains that Mr. Collis would not have the advantage of incumbency had the 1982 Board of Equalization elections been conducted constitutionally.

"The importance of the incumbency advantage is indicated by the lengths to which the Democratic Party went to secure this advantage for Mr. Matthew G. Martinez in his 1982 campaign in the Thirtieth Congressional District: the 30 CD incumbent, Congressman Danielson, was given a judicial appointment so a special election for his unexpired term could be held concurrently with the June 1982 primary. As planned, Mr. Martinez won this special election; and his incumbency was a decisive factor in the November General Election.

"This court can and should do for the residents of the Board of Equalization district now represented by Mr. Collis the same thing Congressman Danielson did for the Drmocrats of 30 CD: cut short the term of the incumbent and schedule a special election to fill the resulting vacancy concurrently with the upcoming June primary election.

"Should this court fail to act prior to the printing of ballots for the June primary, this would not justify any continued refusal to act. In Hamer v. Campbell [(1966) 358 F.2d 215, 222] the Court of Appeals ruled:

'In denying the injunction on

> the merits, the District Court pointed to the fact that the ballots had already been printed. We do not believe that the slight inconvenience to the appellees in reprinting the ballots justified the Court's refusal to enjoin the elections.'

There is plenty of time for this court to schedule a special election concurrent with the June 1986 primary. This will allow an individual with the advantage of incumbency gained from an election in a properly apportioned district to carry this advantage into the November General Election. But if this court should fail to act in a timely fashion the Court should at least deny Mr. Collis the opportunity to perpetuate his unfairly gained advantage by stripping him of an incumbent's listing on the November 1986 ballot.

"At the time when Plaintiff proposed (at 10 Record 359) declaratory relief as an alternative to legislative term-shortening he never imagined that an entire four-year Board of Equalization term would be allowed to run out before this court took action on his Board of Equalization claim. Nevertheless this possibility has become a clear and present danger, so Plaintiff hereby modifies his motion of December 6, 1983 to provide declaratory relief relating to the invalid 1982 Board of Equalization elections:

> 'Notice is hereby given that [at a time designated by the Court] Plaintiff will

> appear before the panel of judges designated in this case, in the courtroom usually occupied by them at the United States District Courthouse, 650 Capitol Mall, Sacramento, California, and then and there move under 28 U.S.C. § 2284 for (1) a declaratory judgment that the [1982 Board of Equalization Districts] used pursuant to [an unsigned and unexplained] order of the California Supreme Court are unconstitutional on federal grounds and on state grounds arising from a common nucleus of facts. Inasmuch as [the use of these Board of Equalization districts was] known to be unconstitutional by those responsible for their [continued use] and because their use was secured by a 'run-out-the-clock' strategy which evaded adjudication of their constitutionality in spite of the timely filing of challenges to their use in both state and federal court, (2) the elections [the results of which were changed by the malapportionment of] these districts must be declared null and void.'

"In the circumstances which now exist it is appropriate to repeat the statement made by Plaintiff in connection with the delaying tactics used to kill his other challenges to the 1982 districts:

> 'Plaintiff realizes that since this court has ruled that it is too late to unseat ille-

gally elected senators with nearly three years left in their terms of office it is very unlikely that this court will reach a different conclusion regarding [other incumbents], who have [the same] terms. However, if this court does again refuse to act on the grounds that it is too late, this court's extraordinary delays in consideration make it necessary for this court to address Judge Kennedy's question at the October 27, 1982 hearing: "[I]f you say, well, there's nothing we can do, then we wonder what the cause of action means." (11 Record 207.) The run-out-the-clock strategy which has effectively prevented adjudication of this case is clearly capable of repetition and therefore must not evade review, so however the Court rules regarding interim special elections it must address the effect of the protracted use of delaying tactics in this case upon Plaintiff's right to seek effective remedies. Also, since this court's stalling has itself become a critical aspect of the case, this court can ill afford to use the effects of that stalling upon Plaintiff's right to seek a remedy as a rationale for refusing to rule on the constitutionality of the [Board of Equalization] districts used for the 1982 elections; for a

declaratory judgment is itself one of the remedies Plaintiff seeks.' 12 Record 474-475. "Respectfully submitted, Dated March 20, 1986." (16 Record 69-73.)

B. Ninth Circuit's Handling of Plaintiff's Petition

1. District Court's Actions Leading Up to Plaintiff's Appeal

Plaintiff's "Memorandum on the Status of the Case" submitted to Chief Judge Browning summarizes the "Context of Plaintiff's Petition for Mandamus" at 16 Record 482-485:

> 'The order of July 9, 1985 did not just decide pending congressional motions; it dismissed the action 'in its entirety,' sua sponte. When Plaintiff sought reconsideration of the order of July 9 the District Court's order of August 5, 1985 summarily denied it without briefing, hearing or addressing any of the points raised in Plaintiff's motion. Plaintiff comments on this 'bolt from the blue' in his September 20, 1985 Docketing Statement (at 32):
>
> > 'The worst excess of the orders of July 9 and August 5 lies in the fact that the motion upon which the Court acted did not seek dismissal of the action, and such a possibility was not mentioned anywhere in the briefing. If a complaint cannot, consistent with due process of law, be dismissed without a noticed motion, this

> principle applies with even greater force to the dismissal of the whole action. The July 9 ruling that "The action is therefore DISMISSED in its entirety without leave to amend" and the August 5 ruling that "the Court's reasoning in disposing of this case" may be challenged only by "appeal to an appropriate tribunal" constitute a procedural outrage. Since the Court also refused to complete the essential step in adjudicating Plaintiff's state legislative claims of ruling on Plaintiff's long-pending and fully briefed motion for reconsideration of their dismissal and did not even purport to adjudicate Plaintiff's Board of Equalization claim, it is hard to avoid the conclusion that the District Court's precipitous attempt to terminate the action sought to thwart compilation of a factual record truly reflective of the merits of Plaintiff's claims.'

"However, before seeking mandamus relief Plaintiff tried to persuade the District Court to wrap up matters left hanging by its sua sponte termination of proceedings. Plaintiff argues in support of his August 9, 1985 motion seeking 'Issuance of Orders Disposing of Pending Motions' (at 20):

> 'The briefing which is needed for Plaintiff's Board of Equalization motion can be completed, consistent with

Local Rule 230, in as little as four weeks. All other supplemental briefing on pending motions can be accomplished within the same time frame.

'The only hearings this court has held have concerned enjoining the 1982 elections and unseating the extra senators from misnumbered districts. The Court has never heard oral argument concerning population disparities in any of the four sets of districts at issue in this litigation, yet the Court has insisted that this is the most important aspect of the case. Under such circumstances it is hard to see how wrapping up 3½ years of litigation without closing arguments can be in the interests of justice.

'Once briefing and whatever oral argument is appropriate have been completed Plaintiff is entitled to a ruling by the Court on all of his pending motions. Supreme Court Rule 15.1(j)(i) requires an appellant to attach orders disposing of all aspects of the case which he wishes to appeal; this requirement must not be defeated by the lower court's refusal to issue any orders at all or orders so superficial that they completely evade the issues regarding the very aspects of the case where the Court's position is weakest. [Emphasis in original.]

> 'Even a guilty man facing imprisonment is entitled to a fair trial, and however lacking in merit this court may consider Plaintiff's claims to be, DUE PROCESS OF LAW is no less mandatory where the litigant alleges an impairment of his political liberty.'
>
> "Only after the District Court had ignored for three weeks Plaintiff's motion to facilitate his appeal did Plaintiff file his August 31, 1985 petition for mandamus (C. A. # 85-2496)."

2. Ninth Circuit's Denial of Jurisdiction over Plaintiff's Appeal

Plaintiff's memorandum notes the circumstances of the Assembly's motion to dismiss his appeal at 16 Record 487-488:

> "The Assembly objected to a prebriefing conference and filed a motion to dismiss Plaintiff's appeal. The Assembly's motion and supporting memorandum follows the Assembly's consistent policy of evasiveness, completely avoiding any discussion of whether Plaintiff is in fact entitled to the procedural relief sought in his petition. The Assembly notes in the Introduction to its May 19, 1986 'Memorandum of Points and Authorities in Support of Motion to Dismiss Appeal':

> 'Plaintiff, by filing a Notice of Appeal, has invoked the appeals procedures of this court for review of orders over which the Court lacks appellate jurisdiction. Only the United States Supreme Court has jurisdiction over the appeal presented here. Plaintiff admits as much by, in the body of his papers, characterizing his request for Ninth Circuit review as a request for mandamus.'
>
> "In throwing up this smokescreen the Assembly never suggests any reason why a litigant who feels a district court has deliberately thwarted compilation of an adequate record on which to base an appeal may not seek by means of mandamus to force a court which purports to 'terminate an action in its entirety' to adhere to the Federal Rules of Civil Procedure and 28 U.S.C. § 2284. Indeed, Will v. United States (1967) 389 U.S. 90, 100 affirms the appropriateness of mandamus to compel the District Court 'to exercise its authority when it is its duty to do so,' and Supreme Court Rule 26 precludes a petition for mandamus to the High Court until Plaintiff has shown that 'adequate relief cannot be had in any other form or from any other court.'"

Plaintiff's memorandum summarizes the rulings of the Ninth Circuit dealing with the jurisdictional question raised

by the Assembly at 16 Record 488-493:

> "On August 19, 1986 Judges Tang, Brunetti and Kozinski ruled that the Ninth Circuit lacked jurisdiction over C.A. #85-2496 in an order which does not explain its reasoning and makes no reference at all to the circumstances of Halliwell v. Eu:
>
> > 'The Supreme Court has exclusive jurisdiction over this appeal. 28 U.S.C. § 1253; MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Fusari v. Steinberg, 419 U.S. 379 (1975). Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States. 28 U.S.C. § 1631.'
>
> "The front page of Plaintiff's August 26, 1986 'Petition for Reconsideration of the Order of August 19, 1986' states:
>
> > '(1) The Ninth Circuit's responsibility to enforce the Federal Rules of Civil Procedure recognized in Breed v. District Court [(1976) 542 F. 2d 1114, 1114-1115], as well as Fusari v. Steinberg [(1975) 419 U.S. 379, 387], require the Ninth Circuit to exercise its power of mandamus to put the case record of Halliwell v. Eu into a condition appropriate for Supreme Court consideration before transferring it to that court.
> >
> > '(2) Heckler v. Edwards

> [(1983) 465 U.S. 870, 880] requires that any appeal must be heard initially by the Circuit Court unless appellant is challenging an aspect of a district court disposition of his case that is within the mandatory jurisdiction of the U.S. Supreme Court.
>
> '(3) MTM v. Baxley [(1975) 420 U.S. 799, 804] and Socialist Workers v. Eu [(1978) 591 F.2d 1252, 1258-1259] require that for a case in such a condition as Halliwell v. Eu the proper forum for any feasible appeal on the merits is the circuit court.'

"At 2-3 of Plaintiff's petition for reconsideration of the order of August 19, 1986 Plaintiff notes that both MTM v. Baxley (because this opinion limits direct appeal to orders 'after notice and hearing' which base '[granting or] denying interlocutory or permanent injunctive relief . . . upon resolution of the merits of the constitutional claim presented below') and Fusari v. Steinberg (because the High Court refused to consider the appeal since 'we are unable meaningfully to assess the issues in this appeal on the present record' and remanded the case to clarify the record) support circuit court jurisdiction over Halliwell v. Eu in its current posture. Plaintiff then argues:

> 'How the order of August 19, 1986 finds support in MTM v. Baxley and Fusari v. Steinberg for its conclusion that

> Halliwell v. Eu in its present condition is suitable for mandatory consideration by the U. S. Supreme Court certainly requires some sort of explanation.' Petition at 3.

"Thus Plaintiff's August 26, 1986 motion for reconsideration showed that in the actual circumstances of Halliwell v. Eu all of the authorities in the order of August 19th supported Ninth Circuit jurisdiction. Judges Tang, Brunetti, and Kozinski waited for ten weeks before responding. Then, on the day after the 1986 General Election, the panel abandoned any pretense of a reasoned disposition of Halliwell v. Eu. Their order of November 5, 1986 states in its entirety: 'Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied.'

"Such a disposition of C.A. #85-2496 effectively deprives Plaintiff-appellant of his right to appellate review of the panel's action. As Justice Brandeis notes for the Court in Virginian Railway Co. v. United States (1926) 272 U. S. 658:

> 'Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court.' Id. at 675.
>
> 'The failure to accompany the decree by an opinion may

> thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal; and the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor.' Id. at 675.

"The District Court's sua sponte termination of the action without addressing many vital issues in the case or even ruling on long-pending motions which had been fully briefed created a procedural snarl which has become progressively more tangled as the panel charged with consideration of C.A. #85-2496 has tried to find some way to dispose of Plaintiff's petition without ruling on the validity of his procedural grievances. Since Judges Tang, Brunetti and Kozinski refuse to address the circumstances of the case in either of their two orders the position of the court on the issues raised in briefing is totally obscure.

"Plaintiff warned in his September 20, 1985 Docketing Statement (at 16-17):

> 'The U.S.Supreme Court notes in Roche v. Evaporated Milk Assn. (1943) 319 U.S. 21, 26 that the issuance of a writ of mandamus to an inferior court is appropriate "to compel it to exercise its authority when it is its duty to do so." The District Court's flouting of the expedited consideration

> requirements of 28 U.S.C. § 2284 has been so egregious that both the 1982 and the 1984 legislative elections were conducted without any adjudication of Plaintiff's challenge to the constitutionality of the districts used in them, and unless the District Court is compelled to discharge its duty to adjudicate, the same fate appears likely to befall the 1986 elections. In Hall v. West, District Judge (1964) 335 F.2d 481 mandamus was applied to overcome similar delaying tactics by the District Court.'
>
> Clearly the circumstances of the case required at least the precedence over other civil appeals that is mandated by the Federal Rules of Appellate Procedure, but the Ninth Circuit's response was to wait until the 1986 elections also had passed into history, then refuse to rule on whether Plaintiff was entitled to mandamus."

3. Plaintiff's Motions in Response to the Order of November 5, 1986

Plaintiff discusses his December 1, 1986 motion (16 Record 260-271) to the panel which issued the order of November 5, 1986 for clarification of that order at 17 Record 288-290:

"Faced with what must be one of the most perfunctory purported invocations of the jurisdiction of the Supreme Court in the history of American jurisprudence, Plaintiff protested in his motion for clarification of the order of November 5, 1986:

> 'Since the Ninth Circuit has supervisory responsibility over the District Court which Plaintiff alleges has engaged in a politically motivated systematic obstruction of justice, it simply must enforce those impartial rules which are designed to preserve the integrity of the judicial process. The difference between a judicial system premised on the rule of law and one in which those in authority are above the law is clearly noted in Yick Wo v. Hopkins (1886) 118 U.S. 356, a landmark case famous for its defense of the political franchise as the "fundamental political right, because preservative of all rights." Id. at 370. In Yick Wo the court notes that unbridled discretion "hardly falls within the domain of law" because it has "no rules by which its impartial execution can be secured or partiality and oppression prevented." Id. at 372-373. Emphasis in original. In the circumstances of this case, for any judge to simply wash his hands of responsibility and refuse to explain why is grossly incom-

> patible with that judge's oath of office.' (16 Record 271.)
>
> "Plaintiff's motion for clarification cites a crucial issue raised in briefing prior to the order of August 19, 1986 which must be addressed in a proper disposition of Plaintiff's appeal by any circuit court cognizant of its responsibility to preserve the integrity of its own judicial process:
>
> > 'THIS APPEAL SEEKS RELIEF FROM THE COURT'S REFUSAL TO EVEN DISCUSS SUPREME COURT DECISIONS WHICH CONTRADICT THE COURT'S REASONING AND THE COURT'S EXCLUSION FROM THE RECORD OF FACTS WHICH ARE NECESSARY TO DETERMINE THE CONSTITUTIONALITY OF THE CONTESTED DISTRICTS. Facts and procedures are necessary components, "part and parcel," of substantive determinations, and to allow a lower court to tailor these to exclude from their own and higher courts' consideration everything which does not support the rulings of that lower court makes meaningful appellate review impossible.' (16 Record 216.)"

Plaintiff also filed a petition to the Ninth Circuit en banc which sought an investigation of what had become a total breakdown of due process of law with respect to judicial protection of

political rights. This en banc petition is discussed by Plaintiff at 16 Record 495-497:

> "In his December 1, 1986 petition Plaintiff outlines (at 45-46) the relief he seeks from the Ninth Circuit en banc:
>
> > 'During the nearly five years of Halliwell v. Eu every opinion by the District Court has read like a lawyer's brief which sidesteps all aspects of the case where the facts are adverse to his client's position. Where it has been impossible to sidestep glaring constitutional flaws in the contested districts the District Court has either (a) waited until Plaintiff's motion has become obsolete, (b) refused to rule after briefing is completed, or (c) cut short briefing, held no hearing, and disposed of the motion without addressing its merits.
> >
> > 'Such a process of adjudication makes a mockery of the concept of the rule of law, and the refusal of the Ninth Circuit to force the District Court to follow governing Supreme Court precedents indicates that judicial 'in-group solidarity' has been given precedence over the oaths of office of Judges Wright, Hug, Tang, Brunetti, and Kozinski. When viewed in their totality, the various tactics used to

thwart adjudication in Halliwell v. Eu and preserve the political status quo in California clearly amount to a systematic obstruction of justice. Judge Karlton has sought to cover up the misconduct of the California Supreme Court, Judges Ramirez and Kennedy have sought to protect the reputation of Judge Karlton, and all five of the Circuit Judges who have considered Plaintiff's appeals have engaged in a coverup of this coverup.

'It is abundantly obvious that Plaintiff has no chance at all of securing a record adequate to permit a Supreme Court judgment on the merits of his constitutional claims until this massive coverup is halted. Therefore Plaintiff respectfully moves that the Ninth Circuit en banc (1) establish a fact-finding tribunal to investigate the disposition of Halliwell v. Eu and related cases embodying constitutional challenges to the districts mandated in Assembly v. Deukmejian (1982) 30 Cal.3d 638 and successor districts which manifest similar constitutional flaws and (2) establish procedures which ensure that 28 U.S.C. § 2284 is enforced with sufficient vigor to assure that the 1988 legislative elections in California are conducted in constitutionally adequate districts.'"

On February 20, 1987 Plaintiff argued in support of expedited consideration of his December 1, 1986 motion for clarification of the totally unexplained order of November 5, 1986:

> "Relying on advice from Deputy Clerk Oscar Tagle that it is Ninth Circuit policy that a panel denying reconsideration will consider a motion for clarification, Plaintiff included a request for clarification of the three-judge panel's order of November 5 in his December 1 motion for a stay of transfer of jurisdiction to the U.S. Supreme Court. Supreme Court policy requires an applicant for a stay to first submit such a request to a lower court, so whether or not the Ninth Circuit panel handling Plaintiff's case is willing to provide clarification it must at least rule on his motion for a stay. Plaintiff therefore requests expedited consideration of this motion.
>
> "If the three-judge panel handling C.A. #85-2496 is unwilling to provide clarification, the copy of this letter which goes to Judge Browning should be considered a request that the Ninth Circuit en banc now decide that a reasonable time has passed since December 1 and therefore, as suggested in my en banc petition of December 1, vacate the order of November 5, 1986 and require that it be replaced by one which provides a reasoned

> disposition of the jurisdictional question which was decided without explanation by that order." (17 Record 154.)

4. Plaintiff's Motions in Response to the Order of February 26, 1987

As promised, the Ninth Circuit panel ruled on Plaintiff's December 1, 1986 motion for a stay of jurisdictional transfer until the Court had clarified the grounds for transferring jurisdiction to the Supreme Court; but the panel did so without providing any explanation of why it allegedly lacked jurisdiction over Plaintiff's petition for mandamus.

In stonewalling Plaintiff's request for clarification the order of February 26, 1987 alludes to an appeal under 28 U.S.C. § 1253 (which provides direct appeal from the granting or denial of injunctive relief by a three-judge district court, an issue having nothing to do with Plaintiff's appeal). Plaintiff

was UNABLE to invoke § 1253 because all of Plaintiff's proposed remedies had become obsolete before the District Court ruled on them, and Plaintiff could not submit fresh remedies to the District Court because of that court's refusal to consider any further motions. Thus until Plaintiff's right to mandamus was resolved he was BARRED by Supreme Court Rule 44.4 from seeking injunctive relief on appeal.

The order of February 26 states in its entirety:

> "Appellant's motion for clarification of our prior orders in this case is denied, as is his request for a stay of the transfer of his appeal to the Supreme Court. Appellant fails to comprehend that the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 depends not on the nature of the issues he may seek to raise, but on the nature of the order entered by the district court. We will not entertain any further requests for reconsideration, clarification, or the like.
>
> "Appellant, we note, has also sought an en banc hearing, expressly disavowing any desire for a

> rehearing en banc. His request is factually impossible and is denied on that ground.
>
> "The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further submissions from appellant will be received in this cause. The Clerk shall return to appellant any proffered filings." (17 Record 157-158.)

In his March 6, 1987 "Petition for En Banc Reconsideration of the Order of February 26, 1987" Plaintiff notes that the Ninth Circuit waited until August 19, 1986 to rule on his August 31, 1985 petition for mandamus and continues:

> "However, Judges Tang, Brunetti and Kozinski not only waited almost a year before ruling on the case, when they did rule they ignored Plaintiff's petition for mandamus, provided no opportunity for Plaintiff to file a notice of appeal on the merits, and made an unfathomable determination that the U.S. Supreme Court somehow had 'exclusive jurisdiction over this appeal.' Plaintiff promptly sought reconsideration of the panel's refusal to exercise its jurisdiction (16 Record 240-258), but the Court waited until the day after the 1986 general election before issuing an order which states in its entirety:

> 'Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied.' Order of November 5, 1986 (attached infra)." (17 Record 177-178.)

Plaintiff quotes the order of February 26, 1987 issued in response to his motion for clarification of the obscure orders of August 19, 1986 and November 5, 1986, which provides no explanation of the Court's reasoning but states: "We will not entertain any further requests for reconsideration, clarification, or the like", and,

> "The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further submissions from Appellant will be received in this cause. The Clerk shall return to appellant any proffered filings."

Plaintiff then argues,

> "Since the Ninth Circuit panel could not have concluded in good faith that a pro se litigant needed less guidance on jurisdictional matters than the U.S. Supreme Court, the lack of any explanation in their jurisdictional transfer orders was

> clearly a tactic designed to cripple Plaintiff's right to knowledgeably exercise his right to appeal." (17 Record 181.)

Plaintiff's March 6, 1987 letter to Chief Judge James R. Browning of the Ninth Circuit Court of Appeals quotes the holding of the order of February 26, 1987 that "the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 depends not on the nature of the issues [appellant] may seek to raise, but on the nature of the order entered by the district court" and

> "The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further submissions from appellant will be received in this cause. The Clerk shall return to appellant any proffered filings."

Plaintiff then continues,

> "Unfortunately neither of the panel's two prior orders had said anything about 'the nature of the order entered by the district court.' The second order (of November 5, 1986) is a flat denial of reconsideration without any explanation, and the

Court's order of August 19, 1986 states in its entirety:

> 'The Supreme Court has exclusive jurisdiction over this appeal. 28 U.S.C. § 1253; MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Fusari v. Steinberg; 419 U.S. 379 (1975). Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States. 28 U.S.C. § 1631.'

Since there is no order by Judges Tang, Bruentti and Kozinski that says anything at all about any order issued by the District Court, it is impossible for any litigant to determine which aspect of some prior decision the panel has in mind which allegedly established that 'the Supreme Court has exclusive jurisdiction over this appeal.'

"B. The Ninth Circuit Panel Has No Basis in 'the Nature of the Order Entered by the District Court' for its Jurisdictional Ruling.

"In Plaintiff's August 26, 1986 motion for reconsideration of this order he notes (at 16 Record 245) that MTM v. Baxley supra quotes language from § 1253 which limits that statute's coverage to 'an order granting or denying, after notice and hearing, an interlocutory or permanent injunction,' (emphasis added,) and that the Baxley court also held that 'a direct appeal will lie to this court under § 1253 from

the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.' 420 U.S. at 804. Emphasis added.

"Plaintiff's motion cited prior briefing which showed that the only denial of injunctive relief by the District Court after notice and hearing was on the following ground:

> 'In these circumstances, the ordering of a new election as requested by the Plaintiff would not be an appropriate exercise of the Court's equitable powers.' Order of March 27, 1984 at 12 Record 244.

This same order unequivocally states that this denial of injunctive relief does not 'rest upon resolution of the merits of the constitutional claim presented' (as required by Baxley, supra). (Emphasis added.) At 12 Record 244 the order of March 27 continues,

> 'In holding that we would not, in any event, grant the relief requested in this case we do not pass upon the question of when, if ever, vote acceleration and deferral can rise to the level of constitutional infirmity. In addition, we express no opinion as to the appropriate relief in circumstances other than those before us.' Emphasis added.

"This same briefing also notes that the denial of a proposed November 8, 1983 special election for assembly districts by the order of

March 27, 1984 (at 12 Record 255) on the ground that this proposal was 'obviously moot' was without any hearing by the three-judge court on any aspect of 'the constitutional claim presented.' Also noted in briefing was the fact that no hearing was ever held on Plaintiff's congressional claim. Instead the Court waited until July 9, 1985 and dismissed Plaintiff's complaint 'to the degree it complains of the 1982 congressional apportionment or redistricting plan' on the ground that this claim was moot because 'the relief sought has become impossible to grant due to the passage of time.' See 15 Record 199, 202. Briefing also documented Plaintiff's repeated efforts to secure adjudication of his Board of Equalization claim, which the District Court completely ignores in all of its orders.

"Thus the remaining claims on which no hearing was ever held and which were therefore outside the scope of 28 U.S.C. § 1253 never had their constitutional merits resolved either." (17 Record 165-166.)

Plaintiff's letter concludes:

"When the order of February 26, 1987 is viewed against the background of the totally obscure orders of August 19, 1986 and November 5, 1986 it is clear that the pattern of judicial evasiveness complained of in Appellant's December 1, 1986 en banc petition has been aggravated, not mitigated, by events since then. Plaintiff has as yet

> received no response to his December 1, 1986 request that this ongoing judicial coverup be investigated by the Ninth Circuit. The fact that the December 1, 1986 petition calls for an investigation of charges of deliberate obstruction of justice rather than for a rehearing on the jurisdictional issue decided without explanation by Judges Tang, Brunetti and Kozinski is cited by the same Judges alleged to be obstructing justice as a technical reason for denying the request.
>
> "Surely it is not Ninth Circuit policy that judges allegedly guilty of deliberate sabotage of the judicial process may block an investigation of their own conduct. Yet this is precisely what the order of February 26, 1987 attempts to do with the following ruling: 'No further submissions from appellant will be received in this cause. The Clerk shall return to appellant any proffered filings.'" (17 Record 168.)

5. Abrogation of the Requirements of F.R.A.P. 35(b) Regarding the Forwarding of Plaintiff's En Banc Petition

Plaintiff took appropriate precautions to ensure that no misunderstanding would occur regarding the proper handling of his submissions subsequent to the

order of February 26, 1987. On March 6, 1987 Plaintiff wrote to the Clerk of the Ninth Circuit Court of Appeals:

> "The order of February 26, 1987 clearly indicates that the panel conducting C.A. #85-2496 'will not entertain any further requests for reconsideration, clarification, or the like.' Therefore neither this submission nor any which Plaintiff may file subsequently is or will be intended to elicit further action by the Court which issued the order of February 26.
>
> "However, Plaintiff is obliged to allow this Ninth-Circuit panel to consider certain submissions made to other courts, as an indispensable prerequisite to consideration there." (17 Record 160.)

Plaintiff next noted the requirements of Supreme Court Rule 44.4 and Federal Rules of Appellate Procedure 21 and 35, which require that filings be submitted to the panel which issued the order of February 26, 1987. Plaintiff then continued,

> "Given the extreme sensitivity of Plaintiff's allegation that a politically inspired obstruction of justice is taking place in Halliwell v. Eu, it would be appropriate that any departure from the usual filing and distribution procedures that is

> required of you or any member of your staff be made pursuant to a specific written instruction which is itself made part of the case file." (17 Record 161.)

In his March 16, 1987 "Motion to Judge Browning for Reconsideration of the Refusal to File his En Banc Submissions of March 6, 1987" Plaintiff states,

> "The 35 copies of Plaintiff's letter updating his December 1, 1986 en banc petition and 35 copies of his separate March 6, 1987 en banc petition were accompanied by 2 copies of a letter to Ms. Cathy Catterson, Clerk of the Ninth Circuit Court of Appeals (copy attached). This letter clearly explained why the unwillingness of Judges Tang, Brunetti and Kozinski to consider any further submissions had no effect on Plaintiff's right and/or obligation to file other materials pursuant to the cited portions of Supreme Court Rules and Federal Rules of Appellate Procedure. Plaintiff's letter to Ms. Catterson concluded:
>
> > 'Given the extreme sensitivity of Plaintiff's allegation that a politically inspired obstruction of justice is taking place in Halliwell v. Eu, it would be appropriate that any departure from the usual filing and distribution procedures that is required of you or any member of your staff be made

> pursuant to a specific written instruction which is itself made part of the case file.'
>
> "All of Plaintiff's invocations of specific rules which should have governed the treatment of his submissions and his request for an official acknowledgement of any departure from these rules were ignored. Plaintiff's submissions were returned to him without any statement of what rule or whose authority justified such a rejection. Besides Plaintiff's materials submitted for en banc consideration and both copies of his letter to Ms. Catterson, Plaintiff received only a copy of the order of February 26, 1987 with the following portions underlined in red:
>
> 'We will not entertain any further requests for reconsideration, clarification, or the like. . . . No further submissions from appellant will be received in this cause. The Clerk shall return to appellant any proffered filings."
>
> (17 Record 238-239.)

Plaintiff's motion describes the significance of the rejected en banc petitions:

> "The order of February 26, 1987 gave rise to Plaintiff's renewal of his December 1, 1986 en banc petition seeking an investigation into an alleged massive coverup of judicial misconduct and to his March 6, 1987 en banc petition seeking

reconsideration of deliberately obscure jurisdictional rulings. The order of February 26 states:

> 'Appellant fails to comprehend that the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 depends not on the nature of the issues he may seek to raise, but on the order entered by the district court.'

If this is so there is a clear obligation for a court of appeals alleging, 'The Supreme Court has exclusive jurisdiction over this appeal' to identify something in 'the order entered by the district court' which supports its jurisdictional ruling. Yet none of the orders by the Ninth Circuit panel handling Plaintiff's appeal give any clue whatsoever as to what aspect of any district court order justifies its jurisdictional determination. Since the panel has adamantly refused to clarify its ruling it is obviously trying to prevent Plaintiff from knowledgeably exercising his right to appeal.

"Where judicial misconduct is an issue Sparks v. Duval County Ranch Co. (1979) 604 F.2d 976, 979 affirms the obligation of a circuit court en banc 'to recall and reform a mandate even after issuance.' Sparks requires that the mandate of the order of February 26, 1987 be reformed at least to the extent that a clear statement of grounds for its jurisdictional ruling be provided to Plaintiff and recalled at least to the extent that the tolling of time for an appeal not start to

run until Plaintiff has received such a statement of grounds." (17 Record 236-237.)

Plaintiff concludes his motion,

"Clearly in these circumstances Plaintiff-Appellant is entitled to a ruling by the Chief Judge of the Ninth Circuit on his right to file the disputed submissions which either accepts the filings or cites some rule of law which justifies their rejection." Emphasis in original. (17 Record 239.)

6. Refusal to File Plaintiff's Notice of Appeal

Plaintiff argues in his March 27, 1987 Notice of Appeal:

"The obscurity of the orders which purport to transfer jurisdiction over Plaintiff's appeal to the Supreme Court is a device whereby those anxious to avoid scrutiny of the procedural misconduct in this case hope to proceed directly to the trial court's substantive rulings without first allowing Plaintiff any opportunity to gain enforcement of his procedural rights and thereby develop a minimally adequate factual record on which to base an appeal on the merits. But Federal Rule of Appellate Procedure 21(b) flatly precludes any such effort to 'get around' procedural issues and proceed directly to the underlying merits on the basis of

> a deliberately misleading record compiled by a district court which has engaged in a systematic obstruction of justice from the inception of the case." (17 Record 249-250.)

In Subsection 4 of the portion of his March 27, 1987 Notice of Appeal entitled, "Systematic Obstruction of Justice" Plaintiff describes the tactics used to sidetrack his petition for mandamus to the Ninth Circuit Court of Appeals:

> "Pursuant to Plaintiff's March 20, 1986 renewal of his plea for expedited consideration of his August 31, 1985 petition for mandamus, a Conference Attorney for the Ninth Circuit set in motion arrangements for a prebriefing conference. (See 16 Record 104.) However, the Assembly then moved to block such a conference and to dismiss the appeal. This led to the Ninth Circuit's order of August 19, 1986, which purported to transfer jurisdiction over Plaintiff's petition of mandamus to the U.S. Supreme Court without giving any explanation of why the Court had decided that 'The Supreme Court has exclusive jurisdiction over this appeal.' (16 Record 239.)
>
> "Plaintiff's motion for reconsideration of the order of August

19 was rebuffed by the even more cryptic order of November 5, 1986, which said only, 'Appellant's petition for reconsideration of the order transferring this appeal to the Supreme Court of the United States is denied.' (16 Record 259.)

"Given the refusal of the Ninth Circuit to provide even the barest semblance of the information which Supreme Court Rule 15 requires to invoke the jurisdiction of the High Court, Plaintiff was faced with the necessity of using up most of the time before the docketing deadline in the Supreme Court in an effort to research all possible jurisdictional arguments. Plaintiff would then have had to devote most of his jurisdictional statement to complex issues such as the applicability of Heckler v. Edwards (1983) 465 U.S. 870, with little space left for the issues he would raise in an appeal on the merits. Then, under Rule 16.7, Plaintiff would face the possibility of a summary affirmation of the District Court's disposition of the case, and since Supreme Court Rule 15.1(j) requires complete texts of lower court opinions of which review is sought but Rule 15.3 limits appellant to 30 pages, Plaintiff was gravely concerned about the misleading nature of the statements made about the case by the District Court.

"Plaintiff therefore filed a motion (16 Record 260-271) in the Ninth Circuit seeking clarification of the order of November 5, 1986, and when seven weeks had passed without a ruling and the docketing

> deadline loomed ever closer, Plaintiff made application (16 Record 336-343) to his Circuit Justice for a stay of jurisdictional transfer pursuant to the order of November 5 until that totally obscure order had been clarified." (17 Record 317-320.) Emphasis in original.

In Subsection 5, entitled, "Need for an Investigation of Tactics Used to Sabotage Plaintiff's Right to an Adjudication on the Merits," the Notice of Appeal continues,

> "In the course of trying to avoid the procedural trap into which he was being forced by the order of November 5, 1986, Plaintiff petitioned (16 Record 284-335) the Ninth Circuit en banc seeking an investigation of the continuing obstructionist tactics being employed by judges handling his case and asked for intervention by the Chief Judge of the Ninth Circuit (16 Record 282-283) to ensure that there would be a ruling as promised (16 Record 344) on his motion for clarification of the order of November 5 before his appeal was transferred to the U.S. Supreme Court. Plaintiff prepared a detailed documentation (16 Record 346-502) of the complained-of obstructionist tactics and submitted this "Memorandum on Status of the Case as of January 22, 1987" to the Chief Judge of the Ninth Circuit in support of his December

1, 1986 request to the Ninth Circuit en banc for an investigation. He also submitted it to the Circuit Justice for the Ninth Circuit in support of his application for a stay of jurisdictional transfer.

"Pursuant to a request on behalf of Justice O'Connor, Plaintiff also prepared and submitted in support of his stay application a compilation of 'District Court's Orders in the First Five Years of Halliwell v. Eu' and a companion volume, 'Contexts and Principal Passages of the Orders of the District Court in Halliwell v. Eu, February 19, 1982 - February 19, 1987.'

"On February 26, 1987 the Ninth Circuit panel handling Plaintiff's appeal issued the promised ruling on Plaintiff's motion for clarification, but the order of February 26 did nothing to explain the Court's jurisdictional reasoning aside from apparently rejecting Plaintiff's interpretation of Heckler v. Edwards supra. This order held,

> 'Appellant's motion for clarification of our prior orders in this case is denied, as is his request for a stay of the transfer of his appeal to the Supreme Court. . . . We will not entertain any further requests for reconsideration, clarification, or the like.' Id. at 1.

"The panel also purported to 'hang up the phone' in behalf of the Ninth Circuit en banc and to 'yank the cord out of the wall' in behalf of the Ninth Circuit itself:

the order states,

> 'Appellant, we note, has also sought an en banc hearing, expressly disavowing any desire tor a rehearing en banc. His request is factually impossible and is denied on that ground.
>
> 'The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further submissions from appellant will be received in this cause. The Clerk shall return to appellant any proffered filings.' Id. at 2.

"Whatever might be said regarding the holding of the order of August 19, 1986 that jurisdiction over Plaintiff's appeal properly belonged in the Supreme Court, there is no doubt that a litigant who sought to invoke the Supreme Court's jurisdiction in such a perfunctory manner would find his jurisdictional statement rejected out of hand. The adamant refusal of the orders of November 5, 1986 and February 26, 1987 to supply any explanation of the Court's reasoning clearly interferes with the knowledgeable exercise by a pro se litigant of his right to appeal. Therefore Plaintiff is clearly entitled to a delay in jurisdictional transfer until the grounds for such a purported invocation of Supreme Court jurisdiction have been explained with reasonable clarity.

"The orders of November 5, 1986 and February 26, 1987 are demon-

> strably only the tip of an iceberg which consists of a fierce determination by several judges of the Ninth Circuit to sweep under the carpet what has transpired in five years of Halliwell v. Eu. There certainly ought to be some forum in which Plaintiff's extensive and thoroughly indexed documentation of judicial misconduct described above can be given thoughtful evaluation, and such an evaluation should commence very soon so that informed decisions can be made regarding the proper course of future proceedings in this case in time to prevent a fourth set of elections from getting underway using the contested districts without any adjudication of their constitutionality." (17 Record 320-324.) Emphasis in original.

Plaintiff contends in his March 27, 1987 Notice of Appeal (at 17 Record 254) that "after five years of combatting one obstructionist tactic after another [Plaintiff] should not be required to simply respond to further tactics of this sort," and that "an investigation to examine [Plaintiff's] documentation of his claims regarding [past] obstructions of justice is the only way that

such tactics can be terminated and the case set on a proper course toward adjudication on the merits."

On April 9, 1987 Plaintiff's Notice of Appeal was returned to him by the Ninth Circuit. The Notice was marked, "RECEIVED Clerk, U.S. Court of Appeals MAR 30 1987," but spaces for date filed and docketed were left blank. The returned Notice of Appeal was accompanied by a xeroxed copy of the order of February 26, 1987, with "COPY" stamped in blue on its face and the initials "M.B." inscribed in the upper left corner.

The above seems to indicate that the Honorable Melvin Brunetti has decided to adopt the policy of his (Reno, Nevada Branch) Ninth Circuit colleague, the Honorable Proctor Hug: In slamming the door of the Ninth Circuit on Plaintiff's effort to secure a ruling on the propriety of the procedural conduct of the

District Court when the continuing obstruction of justice in Halliwell v. Eu was one year old, Judge Hug's order of January 3, 1983 (6 Record 413-414) implied that raw judicial power was an appropriate substitute for invocation of any rule, precedent or explanation.

Since Supreme Court Rule 12.1 tolls the time limit for docketing an appeal pursuant to 28 U.S.C. § 1253 (which is the alleged basis for transferring jurisdiction over Plaintiff's appeal to the Supreme Court) "from the filing of the notice of appeal," the peremptory refusal to file Plaintiff's Notice strikes directly at Plaintiff's right to appeal. Furthermore, Supreme Court Rule 15.1 requires that the jurisdictional statement include "A copy of notice of appeal showing the date it was filed and the name of the court where it was filed," and Rule 12.3 specifies that in order to

complete the docketing process appellant must "comply in all respects with Rule 15."

Moreover, when jurisdiction is transferred under 28 U.S.C. § 1631 the notice of appeal is the only available means of indicating in a timely fashion whether an appellant wishes to challenge the lower court's jurisdictional determination or pursue an appeal on the substantive merits. By filing a detailed notice of appeal Plaintiff sought to make it a matter of record that Appellees have been provided with 90 days' notice (60 from the Notice of Appeal to appellant's docketing deadline, plus 30 more days pursuant to the response deadline of Supreme Court Rule 16.1) concerning the scope of the conspiracy to obstruct justice which Plaintiff alleges. Since Appellees have received this ample notice their evasive responses to Plaintiff's

allegations will be much less likely to go unrecognized as such by the High Court.

Plaintiff has been unable to find any other case in which a court whose actions are being appealed has refused to file a timely notice of appeal. Clearly the refusal to file Plaintiff's Notice of Appeal without reference to any rule which justifies this refusal is antithetical to the interests of justice.

Respectfully submitted,

_____

MICHAEL J. HALLIWELL
Plaintiff-Appellant
in Propria Persona

Dated April 29, 1987

CERTIFICATE OF SERVICE

C.A.# 85-2496

On April 30, 1987 I served the attached memorandum on Ninth Circuit's handling of Plaintiff's three appeals via first-class mail with postage fully prepaid at Santa Monica, California on the interested parties in this action listed below:

Deputy Atty. Gen. Carol Hunter
1515 K Street, Suite 511
Sacramento, CA 95814

The Hon. Lawrence K. Karlton
Chief Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Raul A. Ramirez
District Judge, Eastern Calif. District
U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

The Hon. Anthony M. Kennedy
Circuit Judge
Ninth Circuit Court of Appeals
555 Capitol Mall, Suite 3400
Sacramento, CA 95814

Clerk, U.S. District Court
650 Capitol Mall
Sacramento, CA 95814

Anthony L. Miller, Chief Counsel
Richard S. Nishite, Staff Counsel
Oliver S. Cox, Staff Counsel
1230 J Street
Sacramento, CA 95814

Joseph Remcho, Chief Counsel
Barbara Brenner, Staff Counsel
Remcho, Johansen & Purcell
220 Montgomery St., Suite 606
San Francisco, CA 94104

Conrad G. Tuohey and Teresa M. Ferguson
Tuohey & Prasse
1200 N. Main St., Suite 800
Santa Ana, CA 92701

Allan Browne and Benjamin Schiebe
Browne & Woods
2400 Avenue of the Stars, Fourth Floor
Los Angeles, CA 90067

Executed this 30th day of April, 1987 at

Santa Monica, California

2930 Colorado Ave. #D-18
Santa Monica, CA 90404

_____

MICHAEL J. HALLIWELL
Plaintiff in Propria Persona

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UNITED STATES CONSTITUTION

Article I. Section 2.

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

Article I. Section 5.

> "Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide."

Article I. Section 10.

> "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Article III. Section 1.

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Article III. Section 2

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; -- to all cases affecting ambassadors, other public ministers and consuls; -- to all cases of admiralty and maritime jurisdiction; -- to controversies to which the United States shall be a party; -- to controversies between two or more States; -- between a State and citizens of another State; -- between citizens of different States; -- between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

Article IV. Section 4.

> "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence."

Article VI. Paragraph 2.

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

First Amendment

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Eleventh Amendment

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Fourteenth Amendment. Section 1.

> "All the persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifteenth Amendment. Section 1.

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

CALIFORNIA CONSTITUTION

Article I. Section 3.

"The people have the right to instruct their representatives, petition government for redress of grievances, and assembly freely to consult for the common good."

Article I. Section 7(a).

"A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to

impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

"Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

"In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-1980 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

"In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests,

including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

Article II. Section 1.

"All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."

Article II. Section 8.

"(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

"(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been sighed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candi-

dates for Governor at the last gubernatorial ection.

"(c) The Secretary of State shall then submit the measure at the next general election held at least 131 days after it qualifies or at any special statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

"(d) An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

Article II. Section 9.

"(a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

"(b) A referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors.

"(c) The Secretary of State shall then submit the measure at the next general election held at least 31 days after it qualifies or at a special statewide election held prior to that general election. The Governor may call a special statewide election for the measure."

Article II. Section 10.

"(a) An initiative or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwide. If a referendum petition is filed against a part of a statute the remainder shall not be delayed from going into effect.

"(b) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

"(c) The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

"(d) Prior to circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.

"(e) The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors."

Article IV. Section 1.

> "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Article IV. Section 3(b).

> "On extraordinary occasions the Governor by proclamation may cause the Legislature to assemble in special session. When so assembled it has power to legislate only on subjects specified in the proclamation but may provide for expenses and other matters incidental to the session."

Article IV. Section 6.

> "For the purpose of choosing members of the Legislature, the State shall be divided into 40 Senatorial and 80 Assembly districts to be called Senatorial and Assembly Districts. Each Senatorial district shall choose one Senator and each Assembly district shall choose one member of the Assemble."

Article IV. Section 8(b).

> "The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, two thirds

of the membership concurring. No bill may be passed until the bill with amendments has been printed and distributed to the members. No bill may be passed unless, by roll-call vote entered in the journal, a majority of the membership of each house concurs."

Article XXI

"In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the Senatorial, Assembly, Congressional, and Board of Equalization districts in conformance with the following standards:

"(a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.

"(b) The population of all districts of a particular type shall be reasonably equal.

"(c) Every district shall be contiguous.

"(d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the state and ending at the southern boundary.

"(e) The geographical integrity of any city, county, or city and country, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section."

UNITED STATES CODES

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928." (West's Annotated Federal Codes, Chapter 81, p. 28.)

28 U.S.C. § 1631. Transfer to cure want of jurisdiction

"Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed

for the court from which it is transferred. (Added Pub.L. 97-164, Title III, § 301(a), Apr. 2, 1982, 96 Stat. 55.)" (West's Annotated Federal Codes, Chapter 99, p. 263.)

28 U.S.C. § 1651. Writs

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102." (West's Annotated Federal Codes, Chapter 111, p. 2.)

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

"(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

"(b) In any action rquired to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the

court shall be as follows:
(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.
(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.
(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application

for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.
June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, § 1 (19), 74 Stat. 201; Aug. 12, 1976, Pub.L. 94-381, § 3, 90 Stat. 1119."
(West's Annotated Federal Codes, Chapter 155, pp. 195-196.)

42 U.S.C. § 1983. Civil action for deprivation of rights

"Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284."
(West's Annotated Federal Codes, Chapter 21, p. 15.)

California Elections Code § 55.

Chief election officer

"The Secretary of State is the chief elections officer of the state, and has the powers and duties specified in Section 12172 of the Government Code.
(Added by Stats.1976, c. 226, §2.)"
(West's Annotated California Codes, p. 42.)

California Government Code § 12172.5.

Chief elections officer;

administration of Elections

Code; powers; regulations

"The Secretary of State is the chief elections officer of the state, and shall administer the provisions of the Elections Code. The Secretary of State shall see that elections are efficiently conducted and that state election laws are enforced. The Secretary of State may require elections officers to make reports concerning elections in their jurisdictions.

"If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elec-

tions officer in discharging his duties.

"In order to determine whether an elections law violation has occurred, and notwithstanding Sections 17132, 17133, and 17135 of the Elections Code, the Secretary of State may examine voted, unvoted, spoiled and canceled ballots, vote-counting computer programs, absent voter envelopes and applications, and supplies referred to in Section 17022 of the Elections Code. The Secretary of State may also examine such other records of elections officials as he or she finds necessary in making such a determination, subject to the restrictions set forth in Section 6253.5.

"The Secretary of State may adopt regulations to assure the uniform application and administration of state election laws.
(Formerly § 12172, added by Stats. 1975, c. 1119, p. 2727, § 3, eff. Sept. 28, 1975. Renumbered § 12172.5 and amended by Stats.1977, c. 1205, p. 4075, § 83; Stats. 1978, c. 847, p. 2685, § 8.5.)

"Historical Note

"The 1977 amendment renumbered § 12172 to be this section, and added the last paragraph.

"The 1978 amendment inserted the third paragraph."
(West's Annotated California Codes, pp. 59-60.)

California Elections Code § 30000.

District boundary maps; deposit; use

"Any maps describing the boundaries of the districts, as contained in this division, which have been prepared by the Legislature or a committee of the Legislature in connection with the enactment of this division may be deposited with the Secretary of State in order to illustrate the boundary lines set forth in this division. Maps deposited with the Secretary of State pursuant to this section may be used by the Secretary of State and the several county clerks for purposes of assisting in the interpretation of this division and to facilitate the Secretary of State and the county clerks in their administrative functions involved in the conduct of elections.
(Added by Stats.1983-84, 1st Ex. Sess., c. 8, p. ___, § 2, urgency, eff. Jan. 2, 1983.)[Noted above § 30000:] Another Chapter 1, 'General,' consisting of §§ 30000, 30001, added by Stats.1981, c. 537, p. 2010, § 3, was submitted to the people by Referendum Statute at the primary election June 8, 1982 and was rejected by the people at that election." (West's Annotated California Codes, pp. 69-70.)

California Elections Code § 30012 (1981)*

"[D]istricts designated in Section 30011 and set forth in this section shall be constituted in a manner to reflect the following adjustments:

"Assembly District 18, that part contained in Santa Clara County, shall not consist of partial census tract 5050.02.

"Assembly District 20 shall consist of the whole Census Tract 6115, contained in San Mateo County, rather than the partial Census Tract 6115.

"Assembly District 21, with respect to Santa Clara County, shall not consist of the partial Census Tracts 5102 and 5104; shall consist of partial Census Tract 5085.06, consisting of that part of the tract not contained in the City of Santa Clara, rather than whole Census Tract 5085.06; partial Census Tract 5116.01 shall be limited to that portion of the tract not contained in the City of Los Altos Hills; and, with respect to San Mateo County, shall not consist of partial Census Tract 6115.

"Assembly District 22, as contained in Santa Clara County, shall consist of whole Census Tracts 5102 and 5104, rather than those partial Census Tracts; and partial Census Tract 5116.01 shall be limited to that portion which is not contained in Assembly District 21.

"Assembly District 23, as contained in Santa Clara County, shall consist of partial Census Tract 5201.01, consisting of that portion of the tract north of Fruitdale

Avenue, and shall consist of partial Census Tract 5085.06 consisting of that portion of the tract contained in the City of Santa Clara.

"Assembly District 24, as contained in Santa Clara County, shall consist of partial Census Tract 5201.01, consisting of that portion not contained in Assembly District 23, rather than Census Tract 5021.01 -- that portion contained within the following Blocks: 101, 104, 304, 307, 315, 310, 314, 316, 204, 203, 202, 205, 211, 207, 208, 209, 210, 206, 111, 115, 106, 107, 201, and 108.

"Assembly District 54, as contained in Los Angeles County, shall consist of partial Census Tract 5552.02 consisting of that portion not in Assembly District 63, rather than that whole Census Tract.

"Assembly District 63, as contained in Los Angeles County, shall contain partial Census Tract 5552.02 consisting of that portion contained within the following Blocks: 101, 103, 104, 106, 107, 108, 109, 110, 116, and 117.

"Assembly District 65, the part contained in Los Angeles County, shall consist of the unincorporated portion of Census Tract 4017.02.

"Assembly District 77, as contained in San Diego County, shall consist of partial Census Tract 28.01, consisting of that portion not in Assembly District 78, rather than whole Census Tract 28.01.

"Assembly District 78, as contained in San Diego, shall consist of partial Census Tract 28.01, consisting of that portion east of

55th Street and its northern extension which consists of Block Group 1." (West's Annotated California Codes, 1983 Pocket Part at 60.)

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* A cleanup bill, 1981 Statutes Chapter 589 § 3 enacted as § 30012 of the California Elections Code, adopted these corrections to A.B. 300 before these districts were adopted in Assembly v. Deukmejian.